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No. 973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
HESS OIL & CHEMICAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
HESS OIL & CHEMICAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 23, 1969.

OPINIONS BELOW

The opinion of the court below (R. 333)[1] is reported at 415 F.2d 440, and is reproduced in the appendix to this petition (App. at pp. 15-32). The Supplemental Decision and Order of the National Labor Relations Board (R. 71), which the court below affirmed, is reported at 167 N.L.R.B. No. 8, and is reproduced at pp. 34-43 of the appendix to this

[1]The certified record in this case will be cited herein as "R."

petition. An earlier Decision and Order of the Board (R. 67), which was superseded by the Supplemental Decision and Order referred to above, is reported at 148 N.L.R.B. 1080 and is reproduced at pp. 44-47 of the appendix to this petition. The Trial Examiner's Decision appears at 148 N.L.R.B. 1081 and is reproduced at pp. 48-113 of the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1969. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to attempt, through a lockout, to force a union to accept a nonmandatory bargaining proposal, without regard to whether the Labor Board believes that the employer would have locked out in any event in support of other lawful bargaining demands.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, provides in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8 of the National Labor Relations Act, as amended, 29 U.S.C. § 158, provides in pertinent part as follows:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . .

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ."

STATEMENT OF THE CASE

A. The Facts in Brief[2]

On January 22, 1963, Hess Oil & Chemical Corporation (hereinafter referred to as Hess) entered into a contract to purchase from Delhi-Taylor Oil Corporation (hereinafter referred to as Delhi) an oil refinery located at Corpus Christi, Texas. The production and maintenance employees at that refinery were represented for purposes of collective bargaining by the petitioner, Oil, Chemical and Atomic

[2]The facts summarized herein are all taken from the findings of the Trial Examiner, which were adopted by the Board and affirmed by the court below. Pursuant to Rule 23(1)(e) of the Rules of this Court, we have included only those facts which are "material to the consideration of the questions presented" by this petition.

Workers International Union (hereinafter referred to as the Union), which had a collective bargaining agreement with Delhi.

Shortly after the purchase agreement was consummated, Hess and the Union commenced negotiations for a new contract, to take effect after April 1, 1963, when Hess was scheduled to take possession of the refinery. Throughout those negotiations, Hess adopted and maintained the position that it would not commence operation of the refinery unless the Union would agree to certain changes in the existing terms and conditions of employment as provided in the Union's prior agreement with Delhi. (App. 57-59, 63, 66).).

For purposes of the present case, the most significant concession demanded by Hess was that all laboratory and warehouse employees must be excluded from the bargaining unit. (App. 58, 60, 61-62, 64, 66, 67, 72, 75, 80). This proposal would have meant that 30 to 32 employees—out of a total of 200—would have been deprived of their statutory right to union representation. These employees had been a part of the unit since the advent of the Union in 1941, and had been covered by all previous collective bargaining agreements.

In addition, Hess demanded that it be given an unrestricted right to contract out work, that the number of wage classifications and lines of promotion be reduced, and that there be a two-month period after the takeover of the refinery in which employees could be terminated without regard to their seniority and without recourse to the grievance and arbitration procedure. (App. 57-59, 60-21). Hess repeatedly advised the Union that unless *all* of the Company's demands were accepted by March 25, 1963, the refinery would be shut down on April 1, 1963. (App. 58-59, 66).

The parties had several meetings, but no agreement was reached. Although the Union expressly and repeatedly rejected the company's demand for exclusion of the ware-

house and laboratory employees from the bargaining unit, the company adhered to its position on that and other issues.

On March 25, the date which Hess had set as a "deadline" for an agreement, the Union advised the company that its members had voted to reject its proposals, but offered to continue to negotiate without striking and urged the company not to resort to a lockout. (App. 67-68). However, on April 1, 1963, the company carried out its threat and shut the refinery down.

The lockout continued until May 7, 1963, when Hess reopened the plant and reinstated the employees under unilaterally established terms and conditions of employment. A final bargaining session was held on May 22, at which all of the unresolved issues were discussed. The company remained firm in its position on all major matters, including its demand that warehouse and laboratory employees be excluded from the bargaining unit. (App. 79-81). No further meetings were held.

B. The Original Decision of the NLRB

The National Labor Relations Board issued its initial decision in this case on September 16, 1964 (App. 43). In that decision, the Board, adopting the findings and conclusions of its Trial Examiner, held that Hess had committed two separate unfair labor practices. First, the Board held, the company had violated the duty to bargain collectively, as prescribed by Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §§ 158(a)(5), (d), by insisting to the point of impasse on the exclusion of laboratory and warehouse employees from the bargaining unit. The Board found that these employees were properly part of the unit, and that it was unlawful for the employer to insist upon their exclusion as a condition of reaching agreement. (App. 89-90).

Second, the Board held that the shutdown of the refinery from April 1, 1963 to May 7, 1963 constituted an

unlawful lockout in violation of Sections 8(a)(1), (3) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (3), (5). This aspect of the Board's decision was based on the then-prevailing rule that any lockout for the purpose of forcing acceptance of an employer's bargaining proposals is an unfair labor practice.

While the case was pending on review in the court below, and before the record had been filed, this Court rendered its decision in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), holding that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." 380 U.S. at 318. At the Board's request, the court of appeals then stayed its proceedings to permit the Board to reconsider its decision in the light of *American Ship Building*.

C. The Board's Supplemental Decision

On August 17, 1967, the Board issued a Supplemental Decision and Order, in which it reaffirmed its prior finding that the company had unlawfully insisted upon exclusion of the laboratory and warehouse employees from the bargaining unit, but held that, under *American Ship Building*, its earlier holding that the lockout was an unfair labor practice had to be set aside. (App. 34-41).

The Union contended on reconsideration that the lockout was unlawful notwithstanding *American Ship Building*, since one of its objectives was to force the Union to agree to the employer's proposal to exclude warehouse and laboratory employees from the bargaining unit. Thus, the Union argued, it could not be said in this case that the lockout was "for the *sole* purpose of bringing economic pressure to bear in support of the employer's *legitimate* bargaining demands." The Board did not deny that one purpose of the lockout was to force the Union to accept the com-

pany's nonmandatory bargaining proposal—indeed, this was clear in the record and implicit in the Board's finding that the company had insisted upon that proposal. Nevertheless, the Board held that the lockout was not unlawful because "we are convinced that Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from the negotiations, and we find that Respondent's position on that issue did not materially motivate its decision to lock out its employees." (App. 40-41).

D. The Decision of the Court of Appeals

The Union filed a petition for review of the Board's Supplemental Decision and Order, which was consolidated with the still-pending petition filed by the employer. The court affirmed the Board's decision in full.

The Union's principal contention on review was that any effort to force acceptance of an improper bargaining demand through a lockout is unlawful *per se*, and that the question of whether such a lockout might have occurred in any event was both speculative and irrelevant. The court below failed to deal with this argument at all. It simply held that the Board's findings of fact were adequately supported by the evidence. (App. 31-32).

REASONS FOR GRANTING THE WRIT

I.

This case presents an important question concerning the meaning and inter-relationship of two landmark decisions of this Court: *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958), and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). In *Borg-Warner*, the Court held it to be an unfair labor practice for an employer to insist upon a proposal which is not a "mandatory" subject of bargaining under the Act—*i.e.*, which falls outside the area of "wages, hours, and other terms and conditions of

employment" about which bargaining is required. Section 8(d), 29 U.S.C. § 158(d). In *American Ship Building*, the Court held that an employer has the right to lock out his employees "for the *sole* purpose of bringing economic pressure to bear in support of his *legitimate* bargaining position." 380 U.S. at 318 (emphasis added). The question here is how these principles are to be applied when the employer insists to the point of impasse on several bargaining demands, involving both mandatory and nonmandatory subjects, and then locks out his employees in order to force the Union to accept *all* of his proposals.

This question is of major importance both to the administration of the Act and to the preservation of industrial peace. Nonmandatory bargaining demands frequently arise in labor negotiations, since the mere introduction of such demands is not unlawful so long as there is no "insistence" upon them to the point of impasse. But if an employer who has unlawfully insisted upon a nonmandatory demand is still free to lockout with impunity, so long as that demand is coupled with other legitimate proposals, he will obviously have less incentive to comply with his legal obligation to withdraw that demand at an early stage in the bargaining. Thus, the result reached in this case may effectively undermine the *Borg-Warner* rule. It would also tend to make settlement of labor negotiations more difficult, and lead to more frequent and longer lockouts and strikes.

The Board and the court below, without any real analysis of the problem, simply assumed that the legality of a lockout in support of both mandatory and nonmandatory bargaining proposals turned upon whether the employer would have locked out in any event, in support of its legitimate bargaining proposals, even if its nonmandatory proposal had been withdrawn. The theory of this approach, while not expressed either by the Board or the court, apparently was that if the lockout would have occurred anyway, it cannot be said to have been caused by the employer's unlawful demand.

This theory ignores the fact that there is a substantial difference between a lockout which is solely in support of mandatory demands, and one which is in support of both mandatory and nonmandatory proposals. In the former situation, the union can end the lockout at any time without giving up any of its legal rights, merely by acceding to the employer's lawful demands. In the latter situation, on the other hand, acceptance of all of the employer's lawful demands would not end the lockout—the union would also have to agree to a proposal which the Act prohibits the employer from insisting upon and which the union has a statutory right to refuse to bargain about. The holding that such a lockout is not unlawful seems clearly in conflict with the *Borg-Warner* rule.

Moreover, as the Board itself has observed, insistence upon a nonmandatory proposal inevitably tends to "delay or impede or otherwise circumscribe the bargaining process . . ." *International B'hd of Teamsters,* 87 N.L.R.B. 972, 979 (1949). Thus, any effort to determine whether or not the parties would have settled the other issues in dispute, without strike or lockout, if the employer had not injected (or had withdrawn) its nonmandatory demand is necessarily speculative.

In every collective bargaining dispute, there comes a point point at which the parties must decide whether the issues involved, taken together, are sufficiently important to justify tify the tremendous cost of a strike or lockout. If the negotiations in the present case had not been complicated by the Company's nonmandatory demand, either or both parties might well have been more willing to compromise the other issues in order to avoid a strike or lockout. It is thus simply impossible to judge how either party would have weighed its interest in the disputed issues against the costs of the lockout if this one major issue had not been in the balance.

The *American Ship Building* decision, upon which the Board and the court seemed to rely, held only that a

lockout is lawful if its "sole" purpose is to bring pressure in support of "legitimate" bargaining demands. The Court reached that conclusion on the ground that such a lockout does not interfere with any of the rights guaranteed to employees under the Act. By its terms, that decision certainly does not require the result reached here. On the contrary, the language of the opinion at least implies that a lockout which is not "solely" in support of "legitimate" demands, and which does tend to undermine statutory rights, would be unlawful.

The question presented here can arise not only in lockout situations, but in strike situations as well. In fact, as we shall show below, the issue has frequently arisen in the context of a strike in support of both nonmandatory and mandatory demands, and has been resolved in a manner inconsistent with the decision below. Since the question is a fundamental one, and since it requires the interpretation and application of two of this Court's decisions, it should be settled by this Court.

II.

The decision below is in conflict with decisions of other courts of appeals. Perhaps most directly in point are the cases involving strikes in support of both mandatory and nonmandatory or unlawful bargaining proposals. Such strikes have always been held unlawful, without any inquiry as to whether they would have occurred even in the absence of the improper bargaining demand.

For example, in *NLRB v. Amalgamated Lithographers*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963), a union had struck in support of demands for a wage increase and for five contract clauses, all of which the Board had held to be unlawful under Section 8(e) of the Act, 29 U.S.C. § 158(e). On review, the Ninth Circuit concluded that two of the five clauses in issue were not in violation of the Act, and that the union therefore had the right to insist upon and strike for them. Nevertheless, the

court affirmed the Board's finding that the strike was unlawful:

> "In order to hold that a strike or other coercive action is an unfair labor practice under section 8(b)(4), it is not necessary to find that the sole object thereof was one which is prohibited by that statutory provision . . . It is sufficient if one of its objects is unlawful . . . *We think the same rule should apply in determining whether a labor organization has refused to bargain collectively within the meaning of section 8(b)(3) and (d).*" 309 F.2d at 43-44 (emphasis added).

A similar problem was presented in *Douds v. International Longshoremen's Ass'n,* 147 F.Supp. 103, 112-113 (S.D.N.Y. 1956), *aff'd,* 241 F.2d 278 (2d Cir. 1957). That case involved an application for a preliminary injunction under Section 10(i) of the Act, 29 U.S.C. § 160(j), against a strike alleged to be in support of a nonmandatory bargaining demand for a change in the scope of the bargaining unit. Although there were also other legitimate bargaining issues in dispute, the Court held that "when ILA insisted upon this key demand, made it one of the items on which it refused to reach agreement with the Association, and even one of the grounds for strike, it . . . committed an unfair labor practice by refusing to bargain collectively in the appropriate bargaining unit." 147 F.Supp. at 112-13. When the case subsequently came before the Board for final decision, the Board held:

> "Since one of the chief reasons why the ILA resorted to strike action was to enforce its demand for coastwise bargaining and since this was not a legitimate reason, the strike was for an unlawful purpose. *It is well settled that where an unlawful reason is a motivating cause, the coexistence of separate lawful reasons do not eliminate the unlawful aspect of the conduct.*" *International Longshoremen's Ass'n,* 118 N.L.R.B. 1481, 1492 (1957), *remanded on other grounds,* 277 F.2d 681 (D.C. Cir. 1960).

The same result was reached (albeit without discussion of the present issue) in *International Typographical Union v. NLRB*, 278 F.2d 6 (1st Cir. 1960), *reversed in part on other grounds*, 365 U.S. 705 (1961). That case involved a strike in support of a union demand for three contract clauses, all of which were originally alleged to have been unlawful. The court of appeals, however, held that one of the three clauses in issue was a proper subject for bargaining, and this Court held that another of the disputed clauses was also a legitimate demand. Nevertheless, both the court of appeals and this Court affirmed the Board's conclusion that the union's strike was an unfair labor practice, even though two of the three clauses demanded by the union were ultimately held to have been lawful. See also *McCleod v. Compressed Air Workers*, 292 F.2d 358 (2d Cir. 1961); *International Longshoremen's Ass'n*, 159 N.L.R.B. 382 (1966); *Local 156, United Packinghouse Workers*, 117 N.L.R.B. 670 (1957).

In each of the cases cited, the fact that *one* purpose of a union's strike was to bring pressure in support of an unlawful or nonmandatory bargaining demand was deemed a sufficient basis for finding the strike itself unlawful. Although the strike in all of these cases was over legitimate issues as well, no effort was made to speculate as to whether the strike would have occurred in any event, even if the improper proposal had been withdrawn.

If the decision below applies to strikes as well as lockouts, therefore, it is in direct conflict with the cases cited. If, on the other hand, the decision in this case is construed to apply to lockouts only, the effect would be to give employers a right to lockout under circumstances where, if the positions of the parties were reversed, the union would have no right to strike. We doubt that the *American Ship Building* decision was intended to have such an effect.

The decision below is also in conflict with the approach which the Board and the courts of appeals have uniformly

taken in cases in which an employer who is charged with having dismissed an employee for union activities claims that he had independent lawful grounds for the discharge. The issue which such cases present is essentially identical to the issue here—should the Board inquire whether the employee would have been discharged for legitimate reasons in any event, or is the fact that one of the grounds for the discharge was improper sufficient to make it an unfair labor practice? The rule which has uniformly been applied in such situations is that "the mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964). Accord: *NLRB v. Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953); *NLRB v. Barberton Plastics Products, Inc.*, 354 F.2d 66, 68 (6th Cir. 1965); *NLRB v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (2d Cir. 1962), *cert. denied*, 373 U.S. 950 (1963).

In short, the decision in this case is in clear conflict with previously settled principles of law as reflected in decisions of the courts of appeals as well as the Board itself. It therefore warrants review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1969.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21928

HESS OIL & CHEMICAL CORPORATION,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

No. 26681

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HESS OIL & CHEMICAL CORPORATION,
Intervenor.

HESS OIL & CHEMICAL CORP. v. NLRB

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

(September 2, 1969)

Before COLEMAN and SIMPSON, Circuit Judges, and MEHRTENS, District Judge.

COLEMAN, Circuit Judge: These cases spring from a common source and will be decided by this consolidated opinion. The order of the National Labor Relations Board, 167 NLRB, No. 8 (1967)[1] will be enforced. The petition for review in No. 26,681 will be denied.

I *Prior Proceedings*

Proceedings prior to this review may be summarized as follows:

1. Unfair labor practice charge filed against Hess Oil and Chemical Corporation April 2, 1963, alleging that the company violated the National Labor Relations Act by refusing to bargain with the union, in violation of §§8(a) (5) and (1), and by engaging in an illegal lockout of its employees at its Corpus Christi refinery;

2. Complaint filed May 15, 1963;

[1]Supplementing 148 NLRB 1080 (1963).

3. The trial examiner finds the company to be in violation of the Act on both counts of the charge and complaint, November 18, 1963;

4. Decision of the National Labor Relations Board, adopts the trial examiner's findings, September 16, 1964;

5. October 19, 1964, the Board and Hess Oil move this Court to stay further proceedings pending the United States Supreme Court decision in American Ship Building v. N.L.R.B., 380 U.S. 300. Stay granted, October 30, 1964;

6. The Board moves the Fifth Circuit for a second stay to allow the Board to consider the impact of *American Ship Building*. Motion granted, June 2, 1965;

7. The Board issues its Supplemental Decision and Order (August 17, 1967) reaffirming its previous finding on the failure to bargain question but setting aside that part of the earlier decision which held the company to have engaged in an illegal lockout;

8. Hess Oil petitions this Court for a review of the Board order and the Board cross petitions for enforcement. That case was docketed and calendared here as No. 21,928;

9. June 10, 1968, the Oil, Chemical and Atomic Workers International Union filed a petition in the United States Court of Appeals for the District of Columbia Circuit to review that portion of the Board's order concerning the lockout Hess intervened and moved that the union's petition be transferred to the Fifth Circuit. Motion granted August 19, 1968. The case is docketed and calendared here as No. 26,681.

II *Facts*

On January 27, 1963, Hess Oil and Chemical Corporation purchased the properties of Delhi-Taylor Oil Refining Company, including a refinery at Corpus Christi, Texas. At that time, and for many years prior thereto, the production and maintenance employees at Delhi-Taylor's Corpus Christi plant were represented, for collective bargaining purposes, by the Oil, Chemical and Atomic Workers International Union.

To prepare for negotiations with the union, H. W. McCollum, a vice-president of Hess, met March 8, 1963, with two officers of the union, W. I. Forrester and J. Elro Brown. At that time, McCollum announced that Hess had purchased the Delhi-Taylor refinery and wished to negotiate a new contract with the union. He expressly rejected assumption of the existing collective bargaining agreement between the union and Delhi-Taylor and insisted on an entirely new contract. That Hess had no obligation to assume the previously existing Delhi-Taylor contract is not disputed.

One of the major changes McCollum insisted upon was that the laboratory and warehouse employees at the refinery be excluded from the bargaining unit, as it had previously existed, although it was conceded that these employees appropriately belonged to this unit. McCollum contended that their exclusion was necessary because of certain changes Hess wished to make in the employment structure at Corpus Christi. For example, the laboratory employees, who were not covered by collective bargaining agreements at Hess's other plants, would periodically be transferred from location to location. Therefore, to place them in a bargaining unit would restrict the company's freedom to deploy them to other plants. As to the warehouse employees, McCollum stated that Hess intended to retain only one such employee, who would be engaged primarily in record keeping activities.

Another Hess proposal was that the employees at Delhi-Taylor be placed on probation from April 1 to June 1, and that their employment could be terminated during that period without the right to file grievance procedures. Hess, did, however, agree to adopt many of the provisions in the existing contract with Delhi-Taylor, such as vacation and sick leave benefits. Finally, McCollum told the union representatives that the union would have to accept Hess's suggested contract terms in order for the refinery to remain in operation past April 1, the date it was to take possession from Delhi-Taylor.

Thereafter, the parties met eight times prior to April 1. McCollum presented Hess's proposals in writing and

offered modifications in the company's position, but steadfastly declined to change the proposed requirement that the warehouse and laboratory employees be excluded from the bargaining unit. The union rejected all company proposals and insisted, instead, that its contract with Delhi-Taylor be adopted without change for one year.

McCollum submitted a complete contract proposal March 25 which incorporated many of the existing contract provisions. This proposal was, the same day, rejected. Upon learning that the proposal had been rejected, McCollum called the union to determine what it really wanted. He was informed that Delhi-Taylor had refused to turn over certain information requested by the union and was withholding vacation and termination pay from the employees. Brown told McCollum that if he could "get those thieves off his back" [alluding to Delhi-Taylor] an agreement with Hess could probably be reached.

McCollum, eager not to shut the refinery down, met with Delhi-Taylor's president in New York March 26 and volunteered to pay half of the vacation and termination pay (over $100,000) if Delhi-Taylor would agree to pay the remainder and furnish the information requested by the union. This was eventually accomplished. The union and Hess met twice after McCollum's meeting with Delhi-Taylor's president, and the information from Delhi-Taylor was supplied.

However, no contractual agreement was reached, so the Corpus Christi refinery ceased operations April

1. It remained closed until May 7. Hess then recalled most of the employees who had previously worked there.

Following the shut down of the refinery, the union filed charges with the Board, alleging that Hess violated §§8(a) (5) and (1) by refusing to bargain with it and by locking out its employees. The trial examiner found that the company had violated §§8(a) (5) and (1) by insisting on the exclusion of the laboratory and warehouse employees from the bargaining unit and by closing the plant.

The Board agreed with the trial examiner that the company's insistence on the employee exclusion constituted a refusal to recognize the union as the bargaining agent of those employees and ordered it to bargain with the union as the exclusive representative of all employees in that unit, including the laboratory and warehouse employees, 148 NLRB 1080. The Board found, however, that the "record contains overwhelming evidence that Respondent [Hess] was desirous of entering into a contract with the Union and it engaged in good-faith bargaining to that end". Furthermore, the Board findings rejected the contention that the company's position on this issue "served to frustrate collective bargaining on other issues or that the company conditioned execution of an agreement with the Union upon the Union's agreement to exclude the laboratory and warehouse employees."

In this initial order the Board agreed with the trial

examiner that the closing of the plant constituted an illegal lockout.

Faced with these results, Hess filed a petition to review the Board order. Subsequently, both the Board and Hess filed a motion to stay the proceedings until the Supreme Court should decide *American Ship Building Company v. N.L.R.B.*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d. 855 (1965). After that decision was rendered, the Board again moved for a stay to consider its impact on the instant case. That stay was granted.

The Board filed a supplemental decision and order August 17, 1967, 167 NLRB No. 8. It reaffirmed its earlier finding that the company's insistence on the exclusion of the warehouse and laboratory employees from the bargaining unit violated §§8(a) (5) and (1). It set aside, however, that portion of the original decision in which it had found that the lockout was illegal.

As previously stated, the company now petitions for review of the Board finding that the company committed an unfair labor practice by insisting upon the exclusion of the warehouse and laboratory employees from the bargaining unit. The union petitions for review of the Board finding that the lockout was not unlawful.

NO. 21,928 - HESS OIL AND CHEMICAL CORPORATION v. NATIONAL LABOR RELATIONS BOARD.

Hess contends that it is not guilty of violating §§8 (a) (5) and (1) as to the proposed exclusion of the

laboratory and warehouse workers because that issue was a mandatory subject of bargaining and the proposal did not bring about the bargaining impasse between the company and the union. It is said that this is true although Hess concedes that a unit of production and maintenance employees at the Corpus Christi refinery, including warehousemen and laboratory employees, was an appropriate unit. We must reject this argument.

It runs as follows: If this issue was a mandatory subject of bargaining, Hess had a right to insist upon it to impasse. See *N.L.R.B. v. American Compress Warehouse, Division of Frost-Whited Company,* 5 Cir. 1965, 350 F.2d 365; cert. denied, 382 U.S. 982, 86 S.Ct. 558, 15 L.Ed.2d 472. On the other hand, if it were merely a voluntary subject of bargaining, it still had a right to bargain on the subject but could *not* insist upon it to impasse. See *N.L.R.B. v. Floridan Hotel of Tampa, Inc.,* 5 Cir., 1963, 318 F.2d 545. That is to say, one party could not condition acceptance of the collective bargaining agreement upon the other party's acceptance of a non-mandatory subject of bargaining, *N.L.R.B. v. Wooster Division of Borg-Warner Corporation,* 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). Applying those well established rules to the instant case, the company argues, the following result is accomplished: If the exclusion of certain employees is a mandatory bargaining subject, the company could insist upon it to impasse, and by so doing there would be no failure to bargain. If, however, this is only a voluntary subject of bargaining, the Board specifically found that the company's acceptance of the contract with the union was *not* dependent on the union's acceptance

of the exclusion of the warehouse and laboratory employees from the bargaining unit and that the company did not insist upon this subject to the point of impasse. Consequently, the company, under the *Borg-Warner* doctrine, still did not violate the Act. See, also, *Oil, Chemical and Atomic Workers International Union, Local 3-89 v. N.L.R.B.*, D.C. Cir., 1968, 405 F.2d 1111, 1116.

The fatal flaw in this argument is that in the context now before us the issue was neither a mandatory nor a voluntary subject for bargaining.

Section 9(a) of the Act provides:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, *shall be the exclusive representatives of all the employees in such unit* for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." [Emphasis added].

Pursuant to that section, it has been often held that an attempt [to impasse] to restrict bargaining to only certain members of an appropriate unit or to expand bargaining to include those beyond an appropriate unit is an unfair labor practice. In one instance, for example, the employer wanted to recognize the union as the bargaining agent only for union members. In rejecting the employer's attempt the court held that

"the recognition required by 9(a) is not a bargaining matter as petitioner sought to make it. When it was disclosed to petitioner that Local 226 represented a majority of the employees in the appropriate unit, (this was at no time questioned by petitioner) the obligation was then fixed upon it to recognize the Local as the sole and exclusive bargaining agent, not only for the members of the Union, but for all employees. In place of complying with this statutory requirement, petitioner made it the subject of a long and extended bargaining process. Subsequent to the time when demand for recognition was made, petitioner, at all times, has been in default of its statutory obligation. Neither can the consequences of its refusal to grant complete recognition be dissipated by the fact — if it be a fact — that it bargained with the Union on all other matters in dispute. In our view of the situation, there could be no genuine bargaining as contemplated by the Statute until complete recognition had been granted as the Act requires. Notwithstanding the fact that it agreed not to bargain with any other group or individual, its bargaining with Local 226, while limiting its recognition solely to members of the Union, made such bargaining abortive and of little, if any, effect."

McQuay-Norris Manufacturing Company v. N.L.R.B., 7 Cir., 1940, 116 F.2d 748, 751. See, also, *United Biscuit Company v. N.L.R.B.*, 7 Cir., 1942, 128 F.2d 771.

In *Douds v. International Longshoremen's Association,* 2 Cir., 1957, 241 F.2d 278, the court pointed out that there was a clear distinction between "private bargaining over conditions of employment and administrative determination of the unit appropriate for bargaining":

> "The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9(c) of the Act, and its decision is conclusive on the parties (citation omitted), although the decision may subsequently be changed."

241 F.2d at 282. The court further declared that the only process of changing the appropriate bargaining unit

> "not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining unit itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours, and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith . . . ."

Id, 241 F.2d at 283.

Finally, in *N.L.R.B. v. Southland Cork Company*, 4 Cir., 1965, 342 F.2d 702, the Board had certified the union as the bargaining agent for all production and maintenance employees at the company's plant, but the company insisted that the recognition clause in the contract be restricted to permanent employees. The court held that the company's attempt to change the unit was a violation of § 8 (a) (5) "since the Act required it to accord recognition to the union as representative of all the employees in the unit", 342 F.2d at 706. See, also, *United Aircraft Corporation (Hamilton Standard Division) v. N.L.R.B.*, 2 Cir., 1964, 333 F.2d 819; International Brotherhood of Electrical Workers, 116 N.L.R.B. 1792 (1958); *enforced N.L.R.B. v. International Brotherhood of Electrical Workers*, 5 Cir., 1959, 266 F.2d 349.

We hold that an issue concerning the constriction of an appropriate unit so as to exclude certain members from that unit is not a subject for bargaining and an insistence upon it constitutes a violation of § 8(a) (5). The fact that the unit involved here was a contractual unit rather than one certified by the Board should not lead to a different result, since the duty to bargain depends on neither a Board election nor certification, *N.L.R.B. v. Movie Star, Inc.*, 5 Cir., 1966, 361 F.2d 346.

NO. 26,681 - OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION v. NATIONAL LABOR RELATIONS BOARD.

The trial examiner found that, after hard but good faith bargaining, negotiations between Hess and the union reached an impasse March 28, 1963, and that Hess's lockout imposed April 1 was designed to bring economic pressure on the union to compel it to sign an agreement on Hess's terms. In accordance with the law existing at the time, he determined that the lockout violated the Act. However, the Board, in reviewing the case, after the Supreme Court decision in *American Ship Building Company v. N.L.R.B.*, supra, reached the opposite conclusion. The union now contends that because the Board here found that Hess violated § 8(2) (5) by insisting on the exclusion of the warehouse and laboratory employees from the bargaining unit, *American Ship Building* is not dispositive and the lockout was illegal.

In *American Ship Building*, the sole issue before the Court was whether an employer violates the Act, after a bargaining impasse has been reached, by temporarily shutting down his plant "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position", 380 U.S. at 317. It was held that a lockout for that purpose did not violate the Act.

As to the argument that an offensive lockout was a violation of § 8(a) (1), the Court found that such use was in no way "inconsistent with the right to bargain collectively or the right to strike," 380 U.S. at 310. And as to the allegation that a lockout for such purpose violated §8 (a) (3), the Court first noted that an § 8(a) (3) violation turned on employee motiva-

tion. The Court then proceeded to examine the employer's motive:

> "As this case will show, use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union membership as such. The purpose and effect of the lockout were only to bring pressure upon the union to modify its demands. Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest. It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict, and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of § 8(a) (3) absent some unlawful intention . . . ."
>
> 380 U.S. at 312-313.

In light of *American Ship Building*, it has been held that in the absence of any evidence that the employer was hostile to the union, or had attempted to interfere with the union's rights to collective bargaining, or had used the lockout "in the service of designs inimical

to the purpose of collective bargaining", or that the layoff was intended to discipline employees for supporting the union, a lockout is not an unfair labor practice, *Detroit Newspaper Publishers Association v. N.L.R.B.*, 6 Cir., 1965, 346 F.2d 527, 531.

In a case heavily relied upon by the Board in the instant case, the company sought agreement on a "pension insurance" matter, which was not a subject of mandatory bargaining. A lockout followed. The Board, however, found that the company had not insisted to the point of impasse on the union's acceptance of the non-mandatory subject and then locked out its employees to accomplish that result. Rather, the Board found

> "that the Company's conduct during the negotiations evidenced a desire to arrive at a settlement on the terms for a new basic agreement, that the pension-insurance proposals were offered to facilitate settlement, and that the lockout, 'after impasse had been reached on issues other than the pension-insurance matter', was permissible economic pressure in support of a legitimate bargaining position under American Ship Building v. N.L.R.B., 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965)."

Oil, Chemical and Atomic Workers International Union, Local 3-89 v. N.L.R.B., D.C. Cir., 1968, 405 F.2d 1111, 1116. On review, the Court found substantial evidence to support the Board's conclusion that the impasse was not a result of the company's insistence

on the non-mandatory bargaining subject and affirmed the Board's decision, 405 F.2d at 1116.

It has been held, however, that a lockout is illegal where the evidence strongly supports the conclusion that the purpose of the lockout is to prevent the employees from freely determining their bargaining representative and to keep the employees' present representative subservient to the employer, *Tonkin Corporation of California v. N.L.R.B.*, 9 Cir., 1968, 392 F.2d 141. In addition, the Board has held a lockout to be illegal where the impasse which had been reached resulted from the employer's refusal to negotiate in a lawful manner and not from a good faith disagreement over economic matters, *American Stores Packing Company, Acme Markets, Inc.*, 158 N.L.R.B. 620 (1966).

The Board in this case made the following findings: (1) the insistence on the exclusion of the warehouse and laboratory workers from the bargaining unit did not frustrate collective bargaining on other issues and did not contribute to an impasse on the other issues; (2) there was no evidence that Hess conditioned the signing of a contract upon the union's acceptance of Hess's proposal for the bargaining unit exclusion; (3) the union's rejection of Hess's contract proposals was due neither "'solely" nor "primarily" to Hess's insistence on the exclusion of the warehouse and laboratory employees; (4) that Hess would have locked out its employees even had the bargaining unit issue been withdrawn from negotiations; and (5) that the lockout

was not prompted by anti-union animus. These findings are unquestionably supported by substantial evidence.

In No. 21,928 the order(s) of the Board will be ENFORCED.

In No. 26,681 the petition for review is DENIED.

[Filed September 23, 1969]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[CAPTION OMITTED IN PRINTING]

JUDGMENT

Before: COLEMAN and SIMPSON, Circuit Judges, and MEHRTENS, District Judge.

THIS CAUSE came on to be heard upon petitions to review, and a cross-application for enforcement of a supplemental order of the National Labor Relations Board dated August 17, 1967, directed against Hess Oil & Chemical Corporation, its officers, agents, successors and assigns. The Court heard argument of respective counsel on May 27, 1969, and has considered the briefs and transcript of record filed in this cause. On September 2, 1969, the Court, being fully advised in the premises handed down its opinion denying the petition for review in No. 26681; and granting enforcement of the Board's said supplemental order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the Court that the said supplemental order of the National Labor Relations Board in said proceeding be enforced, and that Hess Oil & Chemical Corporation, its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

167 NLRB No. 8

D-54
Corpus Christi, Texas

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DELHI-TAYLOR REFINING DIVISION, HESS OIL AND CHEMICAL CORPORATION AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO	Case No. 23-CA-1596

SUPPLEMENTAL DECISION AND ORDER

On November 18, 1963, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by insisting, to the point of impasse, on the exclusion of certain employees from an admittedly appropriate unit, and that it had violated Section 8(a)(1), (3), and (5) by failing and refusing to operate its plant from April 1 to May 7, 1963, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent and the Union filed exceptions to the Trial Examiner's Decision with supporting briefs. Respondent also filed a motion to reopen the record and the Union filed an opposition thereto.

Thereafter, on September 16, 1964, the National Labor Relations Board issued its Decision and Order,[1] finding that the Respondent had committed the unfair labor practices alleged in the complaint and found by the Trial Examiner and ordering Respondent to cease and desist therefrom

[1] 148 NLRB 1080.

and to take certain affirmative action to remedy the unfair labor practices.[2]

Thereafter, on September 23, 1964, Respondent filed a Petition for Review and to Set Aside the Board's Decision and Order in the United States Court of Appeals for the Fifth Circuit. On October 30, 1964, the Court granted a joint motion of the Board and Respondent to stay further proceedings for purposes of considering the impact of the Supreme Court decision in *American Ship Building Co.* v. *N.L.R.B.*[3] On June 2, 1965, the Court granted the Board's motion for a further stay in the proceedings.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Having reconsidered the matter, and since the record has not yet been filed in the Court, the Board has decided to set aside its prior Decision and Order and to substitute therefor the following Supplemental Decision and Order.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the statements of position filed by the parties in response to the Board's notice to them that it intended to reconsider its Decision and Order, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, subject to the modifications indicated below.

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[2] Affirmatively, the Board's Order required Respondent to bargain with the Union on request, and to make whole each of the employees deprived of employment by payment of backpay with interest.

[3] 380 U.S. 300.

I. Respondent's refusal to recognize the Union as the representative of laboratory and warehouse employees.

On January 27, 1963, Respondent executed an agreement with Delhi-Taylor Oil Refining Company in which it agreed to purchase certain of the latter's properties, including the Corpus Christi, Texas, oil refinery involved herein. On March 8, 1963, McCollum, senior vice-president of Respondent, arranged a meeting with representatives of the Union. At that meeting, McCollum notified the Union of Respondent's purchase of the refinery. McCollum told the Union representatives that Respondent would not assume Delhi-Taylor's obligations under the existing collective-bargaining agreement, which then had a year to run, and included the warehouse and laboratory employees in the bargaining unit, but that Respondent was willing and desirous of negotiating a new agreement with the Union. McCollum stated that such an agreement must contain certain provisions which he then set forth. Among these provisions was one which would have excluded the warehouse and laboratory employees from the bargaining unit. Throughout the subsequent negotiations, at least until April 1, 1963, McCollum adhered to the position that the laboratory and warehouse employees had to be excluded from the unit.

The complaint herein alleges that the Union is the statutory representative of employees in a unit of production and maintenance employees, including, *inter alia,* laboratory and warehouse employees, and that such unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. Respondent's answer does not deny these allegations, and Respondent admitted at the hearing that such unit is appropriate, and that the Union is the representative of a majority of the employees in such unit. In these circumstances, and in view of the record evidence that the Union has represented employees in such

unit since 1941, we find that the laboratory and warehouse employees, at all times material herein, constituted a part of the unit appropriate for purposes of collective bargaining at Respondent's Corpus Christi, Texas, oil refinery.

As indicated above, Respondent adhered, at least until it locked out employees on April 1, 1963, to its position that laboratory and warehouse employees had to be excluded from the bargaining unit. In view of the appropriateness of the unit including such employees, we find that Respondent's adherence to its position in the face of the Union's insistence that it be recognized as their bargaining representative constituted a failure and refusal to recognize the Union as the representative of the laboratory and warehouse employees, and that such failure and refusal violated Section 8(a)(5) and (1) of the Act.[4]

However, we do not find that Respondent's position that laboratory and warehouse employees be excluded from the unit was taken as a means of forestalling agreement on a contract with the Union. The record contains overwhelming evidence that Respondent was desirous of entering into a contract with the Union and that it engaged in good-faith bargaining to that end. Nor are we able to discern any substantial evidence that Respondent's position respecting the exclusion of the laboratory and warehouse employees

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[4] We do not find that Respondent's attempt to obtain the Union's agreement to an alteration of the bargaining unit was, in and of itself, unlawful, for the Act contemplates, at least in some circumstances, alteration of existing bargaining units by voluntary agreement of the parties, *Douds* v. *International Longshoreman's Association*, 241 F. 2d 278 (C.A. 2). However, when the Union rejected the proposal and made clear its determination to represent all of the employees in the existing appropriate unit, conformance with the provisions of Section 8(a)(5) required Respondent to withdraw its insistence on such a proposal. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

served to frustrate collective bargaining on other issues. The detailed findings made by the Trial Examiner concerning what transpired at the bargaining meetings demonstrate that such meetings were devoted almost wholly to discussions concerning the major matters at issue between the negotiating parties, and that the failure to reach agreement on those issues did not stem from the parties' position respecting laboratory and warehouse employees. Finally, we do not find that Respondent conditioned execution of an agreement with the Union upon the Union's agreement to exclude the laboratory and warehouse employees. We are cognizant of the fact that the exclusion of such employees was one of the items upon which Respondent informed the Union it had to have agreement. However, on the basis of the Trial Examiner's findings of what transpired at the negotiation meetings, we are satisfied that the Respondent and the Union were content to defer resolution of this issue until settlement of the substantive terms of the contract. Those issues were not settled during the course of the negotiations spread on the record, but the record fails to show that this was because the Respondent insisted on its proposed exclusion of laboratory and warehouse employees from the unit.[5]

II. Respondent did not violate the Act in failing and refusing to operate the refinery during the period April 1, 1963, to May 7, 1963.

The Trial Examiner found, for reasons fully set forth in his Decision, that the bargaining negotiations between Respondent and the Union had reached a state of impasse on March 28, 1963, and that Respondent's subsequent refusal to operate its Corpus Christi, Texas, oil refinery during the period from April 1, 1963, to May 7, 1963, con-

[5] Cf. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp., supra.*

stituted a lockout of its employees designed to bring economic pressure on the Union to compel it to sign a contract on its terms. We adopt such findings.

On the basis of the foregoing findings and in accordance with Board law existing at the time he issued his decision, the Trial Examiner found that the lockout violated Section 8(a)(1), (3), and (5) of the Act. We are satisfied that the Supreme Court's decision in the *American Ship Building* case requires reversal of these findings.

In the *American Ship Building* decision, the Court squarely held that an employer may lock out his employees, after an impasse in bargaining has been reached, for the sole purpose of bringing economic pressure to bear on their statutory representatives to accept the employer's legitimate bargaining position. In view of that holding, we conclude that Respondent's lockout cannot be deemed unlawful simply because it was offensive, rather than defensive, in nature, or because it was designed, after impasse had been reached on legitimate bargaining proposals, to force acceptance of such proposals.

The record leaves no doubt as to the correctness of the Trial Examiner's findings that Respondent and the Union had reached impasse in their collective-bargaining negotiations concerning the Respondent's legitimate bargaining proposals, and that Respondent locked out its employees to secure Union acceptance of such proposals.

Were these the only issues in this case, the *American Ship Building* decision would clearly require dismissal of the allegations of the complaint that the lockout violated Section 8(a)(1), (3), and (5), as the Union freely concedes. However, Respondent, as we have found, violated Section 8(a)(5) by continued adherence to its position that laboratory and warehouse employees be excluded from the

bargaining unit, and the Union contends that such finding precludes a finding that the lockout was designed solely to compel acceptance of Respondent's legitimate bargaining proposals, and that, therefore, the *American Ship Building* decision does not control our decision in this case.[6]

We have reviewed the record for the purpose of determining the impact upon the negotiations between the parties of Respondent's unlawful insistence upon the exclusion of laboratory and warehouse employees, and the role it played in Respondent's decision to lock out its employees. We have already noted our finding that such insistence was not designed to frustrate collective bargaining on other issues and did not contribute to the impasse between the parties on such issues, and that the record will not support a finding that Respondent was refusing to sign any and all proposed agreements simply on the ground that they did not include a provision excluding laboratory and warehouse employees from the unit. In addition, it is clear that the Union did not reject Respondent's contract terms solely, or even primarily, because they included the provision excluding the laboratory and warehouse employees from the unit; the record clearly reveals that the Union and Respondent were far apart on items which both parties deemed to be of fundamental importance. In view of these circumstances, we are convinced that Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations, and we find that Respon-

[6] We find no merit in the Union's contention that Respondent's insistence that any contract entered into between the parties would not become effective until June 1, 1963, was an unlawful bargaining position. Contrary to the Union, we do not view deferral of the effective date of agreed upon contractual provisions as depriving employees of their right to be represented by their bargaining representative during such interim period.

dent's position on that issue did not materially motivate its decision to lock out its employees.

In view of the foregoing, and as the record indicates that Respondent was not motivated by union animus or in furtherance of an unlawful bargaining position, we find that Respondent's lock out did not violate Section 8(a)(3) or (1) of the Act. Accordingly, we find the Respondent's lock out, generally supportive of Respondent's position on other issues, as it was, was not rendered unlawful because Respondent continued to insist upon bargaining over the unit status of laboratory and warehouse employees. We shall, therefore, dismiss the allegations of the complaint alleging that Respondent's lock out was unlawful.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of the Act.

2. By insisting upon its proposal to exclude laboratory and warehouse employees from the appropriate bargaining unit in the face of the Union's insistence that it be recognized as the collective-bargaining representative of all employees in the appropriate bargaining unit, including the laboratory and warehouse employees, Respondent refused to bargain in violation of Section 8(a)(5) of the Act, and has interfered with employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

3. Respondent did not violate the Act in locking out its employees during the period April 1, 1963, to May 7, 1963.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Delhi-Taylor Refining Division, Hess Oil and Chemical Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all of Respondent's employees in the following appropriate unit:

> All production and maintenance employees, including laboratory and warehouse employees, employed at its Corpus Christi refinery, but excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining, or coercing employees in their exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all employees in the appropriate bargaining unit, and embody any understanding in a signed contract.

(b) Post at its refinery in Corpus Christi, Texas, copies of the attached notice marked "Appendix A."[7] Copies of

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[7] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

said notice, to be furnished by the Regional Director for Region 23 shall, after being duly signed by Respondent or his duly authorized representative, be posted immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the allegations of the complaint that Respondent's lock out during the period April 1, 1963, to May 7, 1963, violated Section 8(a)(1), (3), and (5) of the Act be, and they hereby are, dismissed.

IT IS HEREBY FURTHER ORDERED that the Decision and Order issued on September 16, 1964, be, and it hereby is, vacated and set aside.

Dated, Washington, D. C. Aug. 17, 1967.

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Frank W. McCulloch, Chairman

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Gerald A. Brown, Member

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Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

148 NLRB No. 117 D-6368
Corpus Christi, Texas

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DELHI-TAYLOR REFINING DIVISION, HESS OIL AND CHEMICAL CORPORATION AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO	Case No. 23-CA-1596

DECISION AND ORDER

On November 18, 1963, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Decision attached hereto. Thereafter the Respondent filed exceptions to the Trial Examiner's Decision, a supporting brief, and a motion to reopen the record.[1] The Union filed exceptions to the Trial Examiner's Decision, a supporting brief, and a motion in opposition to the Respondent's motion to reopen the record.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

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[1] The Respondent's Motion to Reopen is hereby denied. The Respondent seeks to introduce subsequent operating statements to confirm the accuracy of its projection of operating expenses. As the Trial Examiner found, and we agree, that these expenses were not the motivating factor for the April 1 shutdown, we deny the Motion.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with modifications noted below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts, as its Order, the Order recommended by the Trial Examiner, and orders that the Respondent Delhi-Taylor Refining Division, Hess Oil and Chemical Corporation, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following modifications:

1. Add as paragraph 1(a) the following:

> Refusing to bargain collectively in good faith with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all of Respondent's employees in the following appropriate unit:
>
> > All production and maintenance employees, including laboratory and warehouse employees employed at its Corpus Christi refinery, but excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined in the Act.

2. Add as paragraph 1(b) the following:

> Discouraging membership in Oil, Chemical and Atomic Workers International Union, AFC-CIO, or any other labor organization, by the discharge of employees, or by discrimination in any other manner with respect to hire and tenure of employment, or any term or condition of their employment.

3. The Trial Examiner's recommended paragraphs 1(a) and 1(b) shall accordingly be relettered as 1(c) and 1(d).

4. Delete paragraph 2(a) and substitute therefor the following:

> Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the above-described appropriate unit and embody any understanding reached in a signed agreement.

5. The Notice shall be amended by deleting therefrom the paragraph which began "We will, upon request, ..." and substituting therefor the following:

> WE WILL, upon request, bargain collectively with the said Union as the exclusive bargaining representative of all production and maintenance employees including laboratory and warehouse employees at the Corpus Christi refinery, excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined in the Act, with respect to wages, hours, and conditions of employment,

and, if an understanding is reached, embody such understanding in a signed agreement.

Dated, Washington, D. C. Sept. 16, 1964.

.....

Frank W. McCulloch, Chairman

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

DELHI-TAYLOR REFINING DIVISION, HESS OIL AND CHEMICAL CORPORATION AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO	Case No. 23-CA-1596

Theodore Arter, Esq., for the General Counsel.

W. D. Deakins, Jr., Esq. (Vinson, Elkins, Weems & Searls), of Houston, Tex., for the Respondent.

James P. Wolf, Esq. (Dixie & Schulman), of Houston, Tex.; *William Rentfro, Esq.*, of Denver, Colo., and *Mr. J. Elro Brown*, for the Charging Party.

Before: *Ramey Donovan*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

The above-named Union on April 2 and 29, 1963, filed a charge and an amended charge, respectively, against the Respondent, Delhi-Taylor Refining Division, Hess Oil and Chemical Corporation, herein called Hess. The complaint

issued on May 15, 1963, and was amended on June 18, 1963. The hearing was held before Trial Examiner Ramey Donovan at Corpus Christi, Texas, on July 18, 19, and 20, 1963, and at Houston, Texas, on July 30, 1963. All parties filed briefs on October 1, 1963.

The complaint as amended alleges violations of Section 8(a)(1), (3), and (5) of the Act. The crux of the complaint is an alleged refusal to bargain and a lockout of over 200 named employees. Respondent, in its answer denies the commission of the alleged unfair practices and sets forth affirmative defenses to the complaint allegations.

Findings of Fact

I. The business of Respondent

Respondent Hess is a New Jersey corporation that manufactures, sells, and ships petroleum products in interstate commerce of an annual value in excess of $50,000. All its activities are related to the petroleum and chemical industry. Hess and its subsidiaries have holdings and assets of a value exceeding $175,000,000. Among these holdings are oil tankers, deep water oil storage facilities, service stations, petroleum pipelines, and oil refineries. Hess markets its products from Boston, Massachusetts, to Florida, and around the Gulf Coast to Corpus Christi and Brownsville, Texas. It owns outright or has an interest in 700 service stations on the East Coast and has approximately 40 terminals throughout the Eastern Seaboard and Gulf Coast. It is found that Hess is engaged in commerce within the meaning of the Act.[1]

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[1] Delhi-Taylor Oil Corporation, herein called Delhi, is not a Respondent herein. Its business, to the extent relevant to this proceeding, is described hereinafter.

II. The labor organization

The Union is a labor organization within the meaning of the Act.

III. The Alleged unfair labor practices

Background

Prior to the sale of certain of its properties to Hess and other purchasers, Delhi was engaged in oil and gas exploration and production in the United States and in other countries, i.e. it explored for and drilled oil and gas wells to obtain those raw materials in their natural state and it transported and sold natural gas through its pipeline subsidiary; Delhi also engaged in manufacturing operations, i.e. it operated two refineries, one at Corpus Christi, Texas, and the other at Port Isabel, Texas, where gasoline and various oils and petrochemicals were manufactured; marketing operations were also conducted by Delhi, i.e. it owned or leased terminal storage facilities for its refined products in the Southeastern United States, New York, and Chicago; it owned 15 service stations for marketing some of its refined products in Virginia, Georgia, and South Carolina; through 5 directly and indirectely owned subsidiaries Delhi owned or leased 109 service stations in Florida, Alabama and Georgia; it also owned 45 percent of the capital stock of Billups Eastern Petroleum Company, a private brand chain-gasoline marketing corporation operating approximately 170 service stations from Virginia to Florida.

In its 1962 Annual Report to Stockholders, transmitted by Delhi President Sewell in March 1963, Delhi stated that "the profitability of the manufacturing, marketing and petrochemical division was adversely affected by the extremely competitive pricing of gasoline and petrochemicals

during 1962 and the gas pipelines appear to have limited possibilities for growth . . . ."[2] The Report announced the sale of the manufacturing, marketing and petrochemical facilities to Hess on April 1, 1963, and the sale of the gas pipelines to named companies. It was also stated that Delhi, would investigate what market value its other properties would have to potential purchasers. The monetary figures show an overall loss of $110,309 for 1962 as compared to a profit of $3,721,460 for 1961.

Delhi is not a Respondent in the instant case nor is its financial condition of concern to us. Our limited interest in Delhi arises somewhat indirectly by reasons of certain testimony of McCollum, senior vice president of Hess and Respondent's principal witness. McCollum testified that in his first meeting with the union representatives he informed them that the Delhi properties being purchased by Hess "were presently losing money . . . and that we felt that if we had an economical operation, a streamlined operation at Corpus [Christi] that we would probably turn this into a profitable operation."[3] McCollum testified that his statement aforementioned about the Delhi properties was based on the 1962 Annual Report of Delhi and advice by the "Delhi management to us [Hess]." Since McCollum did not identify who in Delhi management so advised him nor

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[2] This statement is to be found in the president's transmittal letter. Elsewhere in the Financial Report, it is stated, "Gasoline price wars were prevalent during the year [1962] in many areas of your company's operation, and this condition had the inevitable effect of materially reducing marketing and manufacturing profits."

[3] Details of the purchase and the meetings between Hess and the Union are described hereinafter. The only part of the purchase that affected the Union was the Corpus Christi refinery where the Union had a contract with Delhi.

[4] Counsel for Respondent stated that the Report was an "official document" which is required to be filed with the Securities & Exchange Commission."

did he state what, if any, specifics were given him, it is apparent that the only tangible evidence in the record, regarding the state of Delhi's business, is the 1962 Annual Report. Indeed, this appears to have been Respondent's position since it introduced the Report into evidence in conjunction with McCollum's testimony.

There is no question regarding the fact that the Delhi Report shows a loss for 1962. However, the financial statement is a consolidated one reflecting all Delhi's operations as previously described in this Decision.[5] It further appears that even this consolidated picture indicates that the major problem was a decline in operating revenue.[6] Operating charges or expenses declined in 1962 as compared to 1961.[7]

While it is impossible to ascertain from the consolidated financial statement what the financial picture of the Corpus Christi refinery operation was, it is apparent that the wages, hours, and working conditions covered by the union contract at that refinery would be included under the heading of operating expenses. Here again, the consolidated nature of the figures prevents a pin-pointing of the refinery operating expenses and the only fact we do know is that

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[5] When McCollum was speaking to the Union about Delhi losing money he was evidently referring to the operation and products of the Corpus Christi refinery, the employees of which were covered by a union contract. Other aspects of Delhi operations would not be relevant to the Union at Corpus Christi.

[6] 1962 — $107, 364, 094; 1961 — 113, 133, 456. The term, operating revenue, appears to be synonymous with operating gross income.

[7]

Operating charges:	1962	1961
Cost of sales and operating expenses	$ 89,385,259	$ 93,811,358
Depreciation and depletion	5,250,020	4,653,840
Taxes, other than an income	1,702,861	1,492,032
General, administrative and selling expenses	4,125,247	3,658,819
	$100,465,378	$103,616,049

all "operating expenses" declined in 1962 in an amount of over $4,000,000. These operating charges that increased in 1962 do not appear to have been of such a nature that they were affected by the union contract.[8]

The conclusions warranted by the evidence in the record regarding Delhi's business operations, at least up to this point, are of a very limited nature. Indeed, the only valid conclusion is that the Delhi consolidated operations show a loss of $110,309 in 1962. If we accept the Delhi comment in its Financial Report, not otherwise illustrated by specific monetary financial statements therein, the petroleum manufacturing and marketing operations were unsatisfactory because of marketing and sales difficulties and, more specifically, because of gasoline price wars. It is a reasonable premise, however, that such price wars are, to a major extent, endemic to that phase of the industry. Indeed, such price wars are an aspect of competitive free enterprise and can be considered a normal operational risk incurred by those in the industry.[9] In any event, all we know about Delhi is that it decided to sell its petroleum manufacturing and marketing facilities to Hess, apparently because of pronounced competition in selling gasoline products. We do

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[8] E.g., depreciation and depletion, taxes, general, administrative expenses. Exploration and development expenses increased in 1962 but these are not refinery manufacturing expenses.

[9] The degree of commitment of investors, particularly stockholders possessing a controlling interest in a corporation, to a particular type of operation, varies. The Delhi Financial Report refers to "maximum profitability on employed capital as our objective." In general, all investors expouse this maxim, and no investor is interested in a losing situation, except possibly, under particular circumstances, for tax purposes. However, the maxim of maximum profitability may also apply to circumstances where a particular operation is not necessarily unprofitable but is not as profitable as some other investment to the particular investors. By the same token, another corporation may, because of its own specialization or orientation, have a different view of the same situation.

not know, on the evidence thus far considered, that one phase, the Corpus Christi refinery, of Delhi's rather wide manufacturing and marketing facilities, all of which were purchased by Hess, was inefficient and an excessively high cost operation or that such a condition, if it existed, was attributable to the terms of the existing union contract. Initially, therefore, Respondent has not established at this point its premise that Delhi was losing money because of its Corpus Christi refinery. This does not mean, however, that Hess, through McCollum, could not decide, as it did, not to adopt the Delhi-Union contract and to propose terms to the Union that it considered to be desirable or essential. An employer may of course decide that it must convert an unprofitable operation to a profitable one. But an employer may also decide that instead of an 8 or 10 percent profit it requires a 12 or 15 percent profit.[10] Since at this point we do not know the exact picture of the Corpus Christi refinery and since that picture, whatever it was, would not be determinative as to Hess' objectives for its own business, we simply note that McCollum asserted that Delhi had been losing money in operating the Corpus Christi, refinery.[11]

The sale and purchase agreement between Delhi and Hess was entered into on January 22, 1963. It covered Delhi's petroleum manufacturing and marketing properties, described in detail earlier in this Decision, including the Corpus Christi refinery. The effective date for the acquisition of the properties was 11 a.m., April 1, 1963. In the complaint it is alleged that on January 22, 1963, Respondent became either the employer or a joint employer with Delhi of the employees at the Corpus Christi refinery. Evidence was adduced at the hearing which the General Counsel and the Union apparently believe bears out the

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[10] The figures are taken at random, for illustrative purposes only.

[11] More details of this aspect and of other matters referred to by McCollum are hereinafter considered.

aforementioned allegation since it shows some control over the refinery by Hess, prior to April 1. The Examiner is satisfied, however, that Delhi remained the employer of the Corpus Christi refinery employees until April 1. Such control as Hess exercised prior to April 1 was the normal control that a purchaser would exercise in circumstances of this nature and various acts of comity between seller and purchaser and relations between purchaser and some key personnel of the seller do not alter our conclusion.[12] The matter of the Corpus Christi refinery shutdown on April 1 is discussed hereinafter as well as statements made regarding a shutdown prior to April 1.

The Union had represented the employees at the Corpus Christi refinery since 1941.[13] The contract in effect at the time of the instant events was for the period of March 12,

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[12] Delhi agreed that between January 22, 1963, and April 1, 1963, it would not, except with the written consent of Hess, "A. Incur any obligation or liability in connection with the properties and their operation . . . except (i) current liabilities . . . and obligations under contracts . . . (ii) liabilities and obligations not to exceed 30 days . . . or a maximum capital expenditure by Delhi of $10,000, such liabilities and obligations having been entered into in the ordinary course of business . . . . B. Change or agree to change any terms of employment, including salary or wage rates of any officers or employee of Delhi . . . ." Prior to April 1, work preparatory to the installation of a desalter in the refinery was undertaken by Delhi at Hess' request, with the cost thereof borne by Hess. Also some alterations in office space was undertaken. Hess likewise made some arrangements regarding the retention of Delhi's vice president of manufacturing, Maurer, and required him to move from Dallas to Corpus Christi, and had made plans to retain Warnke, the refinery plant manager, as well as other supervisory and office personnel. Hess sent some foremen in this category to a Hess plant, apparently to observe Hess operations. All these people were on the Delhi payroll prior to April 1, 1963, although it seems possible that the foremen who visited other Hess plants may have been paid by Hess during such period. There is no evidence either way on this last mentioned aspect.

[13] The Union was recognized by the employer, without Board certification.

1962, to March 12, 1964. Respondent admits that the Union was the representative of a majority of the employees in the appropirate unit and admits the appropriateness of the unit.[14] Respondent took the initiative in dealing with the Union as the collective-bargaining agent in the appropriate unit and at no time in the negotiations did Respondent challenge the Union's status. There is also independent evidence in the record of the Union's majority status and of the appropriateness of the unit. Dues deduction authorizations were introduced from a majority of the employees. It appears that the contract unit is the same as that in existence since the Union became the bargaining agent and that the unit has traditionally included warehousemen and laboratory employees as well as other employees. The appropriate unit abovementioned is: all production and maintenance employées at the Corpus Christi refinery, excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined by the Act. Regarding warehousemen and laboratory employees who are and have been part of the appropriate unit, the following appears in the record:[15] as mentioned, these categories of employees have at all times been part of the Corpus Christi unit; according to the uncontroverted testimony of Brown, an international representative of the Union who serviced the local union at the Corpus Christi refinery, there were approximately 26 laboratory employees at the plant; they take samples of charge stock and of products processed and produced at the refinery; they are not chemical engineers and they run routine tests in accordance with specifications of the American Petroleum Institute;

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[14] Respondent so stated at the hearing. The matter of alleged racial discrimination, a special defense raised by Respondent against the Union, will be discussed at a later point.

[15] The relevancy of our discussion of these two categories of employees will appear when we discuss the bargaining negotiations.

they are hourly paid and come up through the ranks; the testimony of Brown and McCollum indicates that there were four to six warehousemen; this record indicates that the warehousemen are hourly paid and do work in connection with supplies, tools, and equipment stored in the refinery warehouse or supply room; they check out tools and other equipment as needed by other employees at the refinery.

The Negotiations

Based on the testimony of Union Representative Brown and McCollum of Hess, the Examiner finds that the following transpired in the meetings between the parties:[16]

McCollum arranged a meeting for March 8, 1963, with Forrester, district director of the Union, and with Brown, the union representative with whom McCollum had conducted contract negotiations in the past regarding other Hess plants.[17] At the meeting, McCollum explained that Hess was purchasing various Delhi properties, including the Corpus Christi refinery. He stated that the refinery had been losing money and that certain changes would be necessary to effectuate economies and to make it a profitable operation; that Delhi had been paying too much for raw material, crude oil; that Hess wanted to be assured of a continuing operation force of employees and also wanted to secure crude oil on a reasonable long term basis inasmuch as more favorable terms were available from oil producers if a long term purchase contract existed; that the two factors were interrelated since Hess did not want to make crude oil and sales contracts without knowing that it could operate the plant and that if a contract could be

[16] With some exceptions, that have been resolved by the Examiner, there is not too much conflict between the two versions and the description herein for the most part, represents a synthesis of the testimony of the witnesses.

[17] Hess has had contracts with the Union at Houston for about 12 years and for 6 years at New Orleans.

reached with the Union Hess could then line up its crude oil contracts;[18] that it was necessary for Hess to secure a 2-, 3-, or 5-year contract from the Union; that Hess did not want laboratory or warehouse employees included in the contract unit; that the contract would have no provision regarding contracting out work;[19] that Hess wanted to reduce the exisiting 72 classifications of employees to 11 and wanted to reduce the 15 lines of promotion for employees to 4 but that he did not feel strongly about having 2 lines of promotion in the process department; that Hess did not intend to recognize the seniority of the employees but that, after various changes in personnel had been made, Hess would give the retained employes a numerical placement in its plant in accordance with their previous standing on the Delhi seniority list; McCollum also stated that Hess would give up to 2 weeks' vacation in 1963 if an employee had not taken his vacation and that paid sick leave would also be provided; that the contract would be effective beginning June 1, 1963, and, in the interim, from April 1, when Hess took over the refinery, to June 1, all employees would be on probation and Hess could terminate employees without any right to file grievances on the Union's part during this period; that McCollum would have to have the Union's agreement by March 25 to the contract terms that he had outlined in order for Hess to continue the plant's operation;[20] that with the exceptions described

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[18] The existing Delhi-Union contract contained a no-strike, no-lockout clause. It also provided for wage reopenings by either party.

[19] The existing contract, article XIV, provided that maintenance work would not be contracted out as long as the Company had the necessary equipment and qualified employees available.

[20] The exact phraseology used on the last mentioned point is not clear. The evidence indicates that McCollum may have said that the plant would be shut down on April 1, unless he had agreement by the Union to his terms by March 25. However expressed, the basic idea was the same.

above by McCollum to the Union, Hess was willing to adopt the other terms of the Delhi contract but Hess was not willing to take over the Delhi contract as it was and to operate under that contract.

The parties agreed that they would meet again in Corpus Christi on March 12 and that Brown would in the meantime discuss the proposals with the union committee at a union meeting scheduled for March 11.

By chance, on the morning of March 11, Brown and McCollum encountered each other in a hotel coffee shop. McCollum stated that the terms he had described on March 8 were not just a bargaining position but that he had to have the terms he had set forth. McCollum said that his company was not "sticky" about wages. Brown testified that he, Brown, said, yes, the employees had already received a 5-percent wage increase, and that McCollum said that he had authorized the increase by Delhi. McCollum denies having made the last mentioned statement but states that he had opposed the increase when Sewell, president of Delhi, advised him of the proposed action. McCollum states that he wished to save the potential wage increase for his own bargaining with the Union. It is not clear from the record exactly when the increase was given but the Examiner is inclined to believe that it was after January 22, 1963, and before March 11. By the terms of the purchase agreement it would appear that Hess' approval was required. McCollum may well have opposed the action as he states but in view of Sewell's determination to proceed there may have been ultimate acquiescence by McCollum or at least he did not bring the issue to a head. Once the matter was a *fait accompli,* the Examiner believes that when Brown mentioned the increase to McCollum on March 11 the latter probably indicated his awareness of the fact, with the implication at least that he had approved or authorized the action.

At the meeting on March 12, Brown and the Union's Workmen's Committee were present, as well as McCollum, Maurer, and Warnke. Brown asked McCollum to again state his proposals. McCollum said substantially, what he had said on March 8. He also said that he did not intend to cut any employee's wage rate except leadermen and that he did not intend to have a leadermen category. In the case of leadermen and anyone else who was placed in a lower classification he would maintain their wage rates until other rates had caught up and then they would be treated equally thereafter. He said that Hess would have a pension plan in 1963. McCollum submitted copies of a document and said that everything not in that document would be carried over from the Delhi-Union contract into the new contract with Hess. As of April 1, when Hess took over the operation of the refinery, McCollum said, the old contract died. The instrument submitted by McCollum was entitled, Articles of Agreement. The preamble stated that Hess recognized the Union as the collective-bargaining agent of all operating and maintenance employees at the refinery, excluding office laboratory, warehouse, technical, guard, clerical, and supervisory employees. Article I stated that the term of the agreement was June 1, 1963, to June 1, 1965. The next article was Article IV, section 5. It provided for shift differential pay.[21] Then followed, "Article XIV, Eliminate," which was a deletion of the contracting out of work provision in the Delhi contract. There were two appendices, one, a job progression chart, starting at "yardman" and advancing upward, and, the second, a list of 11 job titles

[21] This was apparently in reference to McCollum's position to eliminate a provision for "walking time" in the Delhi contract and substitute a differential in lieu thereof. Subsequently, the union representatives said that they would recommend acceptance of this provision to the union membership.

with basic wage rates.[22] McCollum said he would have to have an answer by March 25 or the plant would be shut down on April 1.

Regarding McCollum's proposals on March 8 and 12, and also at subsequent meetings, the Union asked various questions to clarify the meaning of the proposals. There was at no time any mention or threat of a strike by the Union. On March 12 the Union asked about severance pay to which it said it felt the employees were entitled;[23] also, the Union asked about vacation pay that they felt was due, and about pensions, insurance, and hospitalization. McCollum said that anything that the Union and the employees felt was due to them under the Delhi contract would have to be discussed with Delhi. Arrangements were then made for a meeting on March 14 on the Delhi aspect.

Before coming to March 14, there is one other matter that occurred on March 12 that should be mentioned. McCollum gave the Union a letter to sign in conjunction with its acceptance of McCollum's contract proposals. The letter confirmed that the Union had been advised that Hess was not assuming the Delhi contract; it stated, *inter alia*, that

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[22] Wage rates as such did not figure prominently, if at all, in the negotiations. The reduction of classifications, from 72, in the Delhi contract, to 11, was one of the main topics. Thus McCollum's proposal, to take one example, was, Operator A, $3.68; Operator B, $3.40; Process Helper, $3.13; the Delhi contract had operator, A. B, C, D, at $3.50, 3.24, 3.10, 2.96, respectively. Numerous craft classifications, such as four grades of machinists, three grades of electricians, as well as various classifications of welders, boilermakers, painters, pipefitters, and carpenters were reduced to Mechanic A and Mechanic B in McCollum's proposal. McCollum testified that his proposal contemplated that in consolidating the classifications to 11 there would be no reduction in any individual employee's hourly rate of pay.

[23] The Delhi contract contained a provision for termination pay as well as vacation provisions and hospitalization. Delhi also had a pension program.

in consideration for the Union's agreement to enter into a contract with Hess the latter had agreed to recognize the Union as bargaining agent for a unit excluding laboratory and warehouse employees; it also acknowledged that all employees would be probationary for a period of .... days, "during which time any such employee may be terminated by you [Hess] with or without cause and without right of grievance."

Present at the March 14 meeting with the Union were Maurer, Warnke and Vick, who were all employees of Delhi.[24] The Union asked whether Delhi was going to terminate all employees. Maurer, said, no. The Union said that this was contrary to McCollum's statement and Maurer said that he realized that was true. The Union asked if Delhi was going to pay termination pay and the answer was, no. In reply to questions, the company people stated that Delhi would pay the difference in vacation, pay between what the employees got from Hess and that to which they were entitled under the Delhi contract; that Delhi's obligation on sick pay ended on April 1 when Hess took over, except for disability occurring prior thereto; that Hess had an insurance plan; that Hess had agreed to have a pension plan and to take over funds from the Delhi plan to fund past credits for employees. The Union stated that, if there were to be terminations, termination pay was owed under the contract. The Union wanted more information on the pension rights and the new plan but apparently the company people were unable to give further information. The Union said that it wanted to discuss the status of the employees' pensions with someone who was knowledgeable on the subject.

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[24] After Hess took over the refinery these people were employed by Hess.

March 18, at 9 a.m. the Union met with the same Delhi people as on March 14. The company people said that it was not their intention to terminate employees who went over to Hess and that such employees would be transferred and not terminated, assuming that Hess was taking such employees; that if the Union and Hess reached agreement the employees wanted by Hess would be transferred and employees not wanted by Hess would be terminated in accordance with the Delhi contract (which provided for termination pay); that they would probably shut down the refinery and lay off the employees for lack of work if Hess and the Union reached no agreement; that Delhi would pay termination pay only to employees terminated by April 1 and that thereafter it was up to Hess. Vacations were discussed. The Union proposed arbitration on termination pay and vacations. The Company said that it would consult its attorneys. The Union requested the pension reports made to the Government. The Company said it did not have the reports available and that it was not intended that the pension plan be terminated. The Union asked that the administrator of the Delhi pension plan be made available. In reply to a question, the Company said that the matter of the exclusion of laboratory and warehouse employees, shift differential in lieu of walking time, contracting out work, and other matters, were McCollum's ideas. The Company said it did not have a list of employees that Hess would take over. The Union requested an individual accounting of all pension monies, including individual contributions and company contributions.

That same afternoon, March 18, at 2:15 p.m. the Union met with McCollum, Maurer, and Warnke. McCollum said that it was a Hess meeting. The Union told Hess substantially of the contentions and requests that it had made to Delhi regarding termination pay, vacations, and pensions.

McCollum said that Hess was going to institute a pension plan and would fund the past credits of Delhi employees that it took over.

The next meeting between the same people was on March 19. The Union asked McCollum when Hess had purchased the Delhi plant and was told that it was in January 1963. The Union "again" said that Delhi must pay termination pay and accumulated vacations regardless of what Hess did insofar as taking over employees and that even employees who were taken over were entitled to termination and vacation pay from Delhi. The Union said that it would have to represent warehouse and laboratory employees and that the contract would have to protect the employees against work being contracted out. It proposed a 1-year term for any contract. McCollum said that he was adhering to his proposals. The Union proposed one line of promotion and McCollum said he did not feel strongly on this and would consider it. It was also stated by the Union that it should have the right to file grievances regarding employees who were terminated during McCollum's proposed probationary period. The Union proposed that McCollum simply assume the Delhi contract for the balance of its term or for a shorter period. McCollum indicated no willingness to do so. He said that the employees would have security of employment with Hess because the Company would be operating at a profit. The Union said that it would like such security and that it did not think that the employees should be blamed any for losses Delhi may have suffered. The Union said the employees wanted to work and to demonstrate their willingness to perform a full day's work and would be willing to make suggestions for economical operation of the plant.

After the meeting McCollum contacted Sewell, president of Delhi, and told him about the Union's request for pension

information. McCollum said that the Union's request was reasonable and at his behest Sewel arranged to have Mr. St. Peter, administrator of the Delhi pension plan, come to Corpus Christi. McCollum advised Brown of the arrangement on March 19. On March 20 the Union met with Maurer, Warnke, and St. Peter. Pensions were discussed. After St. Peter left the meeting those remaining continued their discussion. Maurer said that they would not arbitrate termination and vacation pay.

Brown wrote to McCollum on March 23 and told him of the contents of the letter on the same day by telephone.[25] The letter said that the Union was considering McCollum's proposals; it referred to the vested rights regarding pensions, seniority, termination pay, vacation and sick pay that the employees had under the Delhi contract and that these were serious problems to the employees; it referred to a provision in the Delhi contract, adopted after the announcement of the sale to Hess, whereby the contract could be assigned to the purchaser; it urged further negotiations, "if" Hess was not bound by the Delhi contract and "if" it was not assuming the contract; mention was made of union proposals regarding lines of promotion and the assumption by Hess of the Delhi pension plan without change; it requested a copy of the Delhi-Hess purchase agreement; it requested Hess, "in view of the effective control Hess is now exercising" over Delhi, to effectuate Delhi's production of the pension information requested by the Union from Delhi; it urged reconsideration of McCollum's intention "to shut down the refinery by April 1 if your proposals are not accepted by the Union"; further negotiations were urged and the Union said that it was

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[25] McCollum had his secretary take down the letter from Brown's dictation.

agreeable to extending "the existing contract past April 1," and urged that in any event the refinery be kept open during further negotiations.

On March 25 the Union met with McCollum, Maurer and Warnke. They discussed seniority. McCollum said that he did not plan to hurt anyone by his proposal, and, after the 60-day probationary period, during which he would have a free hand regarding terminations and changes, he was willing to use the Delhi numerical seniority standings but not years of service since no one would have Hess seniority prior to April 1, 1963. In answer to a question, McCollum said that he was not willing to use as a job classification, Craftsman A instead of Mechanic A, since he did not want to preserve craft identification.[26] The Union asked about early retirement and voluntary termination. McCollum said that he did not want to get into such things at that time but would do so later. McCollum reiterated his vacation, sick leave, and leave of absence, proposals. He said he would give 2 weeks' termination pay for termination between June 1, 1963, and April 1, 1964. The Union asked if the laboratory and warehouse employees would receive the same treatment. McCollum said that he would not bargain with the Union on these categories and that they must be excluded from the contract. He said that he would agree to the union proposal for a single line of promotion and would carry over the Delhi pension plan if Delhi transferred the money to fund back service credits, and would install a Hess pension plan in 1963. McCollum submitted a complete written contract to the Union and also a letter for the Union's signature, addressed to Hess. McCollum said that he had to have the Union's answer by 8:30 p.m. that night or the refinery would start down (shutting down).

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[26] The record indicates that in McCollum's opinion there was too much craft identification and segmentation of work by reason of the 72 Delhi-Union contract job titles.

Many provisions of the March 25 contract instrument submitted by McCollum were the same as those in the Delhi contract. The differences were principally the provisions previously proposed and discussed by McCollum with the Union in earlier meetings. Briefly stated, the contract term was June 1, 1963, to June 1, 1965; warehouse and laboratory employees were expressly excluded from the described unit; there were dues checkoff and vacation provisions; the "changes in classification work" provisions in the two contract were identical although the appendix was in contrast with the Delhi appendix as to classifications, i.e. McCollum's contract had 11 classifications with the basic rates as compared with the 72 Delhi classifications and rates. This change was the same as McCollum had earlier proposed to the Union. The termination pay provisions were identical, with one minor addition regarding recipients of such pay who were rehired and then later terminated. The no-strike and wage reopening provisions were the same. The seniority article of Delhi was in the McCollum contract, plus a good deal more which was not. The most pertinent part of the last mentioned aspect is the provision that for the first 4 months of employment an employee was to be considered a temporary employee. This appears to be in addition to the fact that there would be a temporary or probationary status for former Delhi employees by reason of the fact that if the contract was accepted, and the refinery therefore did not shut down on April 1, 1963, the contract would not go into effect until June 1, in accordance with McCollum's desire to have a free hand during the probationary period.[27]

Following the above meeting with McCollum, the Union held a meeting of its own people. A telegram was sent to

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[27] General Counsel Exhibit 5, Article I; Article XIII, Section 2.

McCollum by the Union on the evening of March 25.[28] It was stated therein that the employees "have voted overwhelmingly not to accept the proposal . . ."; the Union urged further bargaining; stated that it "pledges not to strike and urges that the Company not resort to lockout"; stated that it was prepared to make "further concessions in order to reach agreement" and asked that "you submit to the Union the information previously requested of both companies."

McCollum telephoned Brown on March 26 after learning that the Union had rejected his proposed contract. It is found that, in substance, McCollum said to Brown that he was puzzled as to what was causing the problem between Hess and the Union since he had felt that they had been getting along quite well in their negotiations; he asked what it was that the Union had failed to get and what it was that the Union needed. Brown said that the Union had requested and had failed to receive a copy of the pension report that Delhi had filed with the Secretary of Labor; also, a copy of the pension trust agreement and an individual accounting as to the pension of each employee; further, the Union wanted a copy of the purchase agreement. McCollum said that the Union could not get a copy of the purchase agreement at that time and that Delhi had advised him that the individual pension accounts could be furnished only to the individuals themselves. Brown said that if McCollum could "get those thieves off his back" and get them straightened out so that they would pay the employees that to which they were entitled, he felt that there would be no problem in reaching a contract with Hess.[29] Brown said in

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[28] The addressee was Delhi "and or" Delhi Division of Hess, Corpus Christi, Texas.

[29] Brown's reference aforementioned was to Delhi, as he admits, and he and McCollum both understood this. Brown considered that Delhi was withholding termination and vacation pay to which the employees were entitled.

substance that these matters would have to be straightened out before there was a contract with Hess.[30] McCollum stated that he was "very anxious not to shut the refinery down" and, even though time was running out, Hess wanted to operate the refinery when Hess took it over; that Hess had some options on crude oil and might be able to pull the thing together and that McCollum had an appointment with Sewell the next morning and he would see what he could do. Brown said that was what the Union wanted.

On the following day, March 27, McCollum met with Sewell in New York. He told Sewell of his conversation with Brown and said that time was short. McCollum told Sewell that if the latter terminated the employees Delhi would have to give them termination and vacation pay, and that if Sewell terminated the pension plan Delhi would have to settle up in accordance with the legal requirements in such a situation. McCollum, therefore, urged Sewell to agree to do the foregoing voluntarily and clear up the entire matter. Sewell refused. He said that he was not doing the foregoing things for the salaried employees and he was not going to do it for the union employees. It appeared that the amount of money involved was approximately $100,000. After a lengthy discussion, McCollum then said to Sewell that if Delhi would do what was proposed and if it would furnish the Union with the data requested, Hess would pay half the termination and vacation pay. Sewell agreed and said he would invoice Hess for half the monies due.[31]

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[30] McCollum testified that Brown told him that if the Delhi aspect was taken care of there would be no problem in reaching a contract with Hess. McCollum interpreted this as a statement that if the Delhi issues were disposed of the Union would sign McCollum's proposed contract. Brown states that he did not make such a flat statement and that what he said and meant was that if the Delhi matters were disposed of he was confident that the Union and Hess, through collective bargaining, could arrive at mutually agreeable contract terms.

McCollum testified that the reason he offered to pay half the termination pay was the fact that Hess wanted to operate the plant and wanted to have the employees on hand. He said that he had been generally well impressed by the calibre of the employees at the refinery; he also said that Hess had marketing obligations that he wanted to be carried on; that Hess had pursued negotiations for crude oil to a point where it did not wish to drop them but desired to carry them on at least to an option point or a point of consummation; that considerable work had been devoted to these aforementioned matters and that Hess felt that it was worth while to Hess to have an uninterrupted operation at the Corpus Christi refinery; that McCollum felt that, in view of what Brown had told him on March 26, the Delhi matters were the only obstacle to getting a contract between Hess and the Union.

On March 27, at Corpus Christi, Maurer, Warnke, Vick, and Maxwell met briefly with the Union.[32] They gave the Union a copy of the purchase and sale agreement and said that they would show the attachments that were part of the agreement to the Union on the following day. The company people also said they would submit the individual pension accounts to the Union and a copy of the pension trust agreement to the Union on the following day.

The morning of March 28 a meeting was held. Present for Delhi were Sewell, Maurer, Warnke, and Maxwell. McCollum was there and said that he was sitting in as an observer. The union representatives and committee were present. Sewell told Maxwell to give the Union the trust

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[31] The approximately $50,000 which Hess undertook to pay involved no adjustment in the purchase price of the Delhi properties.

[32] Maxwell was an attorney for Delhi who had participated in the agreement for the sale of the Delhi property to Hess.

agreement, the report to the Secretary of Labor, and the individual pension accounts. This was done. While the others left the room Maxwell stayed with the union representatives and gave them the attachments to the purchase contract. These were examined by the union representatives in Maxwell's presence but were not given to the Union to keep nor were copies furnished for keeping.[33]

During the meeting Sewell was the spokesman for Delhi. McCollum did not participate but was present. Sewell said that Delhi would pay termination pay and accumulated vacation pay to all employees; that it would transfer pension fund credits to Hess for all employees of Delhi hired by Hess. The Union said that it was satisfactory to it if Delhi paid termination and vacation to all employees regardless of whether they were hired by Hess. Regarding pensions, the Union said that it had to have an actuarial accounting as to each employee. The Union said that if it had a contract with Hess it would not try to hold Delhi to its contract. Sewell said that he did not care whether or not the Union had a contract with Hess; that he wanted a release from the Delhi contract with the Union; that he wanted an answer. After lunch, the Union said it could only recommend rejection of Sewell's request for a termination of the contract; that the union committee would

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[33] It appears that the attachments to the purchase agreement were certain leases, contracts, and agreements of Delhi that were assumed by Hess pursuant to its purchase of the Delhi properties. At the hearing, counsel for the Union made a formal demand upon Respondent for the production of the said attachments. Respondent refused to produce. Respondent's counsel said that the documents were confidential contracts, dealing with sales and purchase matters that Respondent was unwilling to have "bandied about the United States" and that the documents had been shown to the Union on March 28. No secondary evidence was offered or sought to be offered regarding the attachments. The parties were aware of the possibility that an adverse inference could be drawn from a failure to produce.

recommend termination of the contract only if Sewell did what he had stated regarding termination and vacation pay, plus protecting each individual under the pension plan, and provided that the Union was able to get a contract with Hess. Sewell said that regardless of what the union committee recommended to its members Delhi was going to start shutting down the refinery tomorrow and would have the termination checks for the employees. He said he would give the Union a contract release agreement for the Union to sign before the union meeting that same evening and if the Union did not release Delhi from the contract Delhi would terminate the employees, pay them termination and vacation pay, and would terminate the pension plan for all employees.[34] The management people then left, with the exception of McCollum and Maurer. McCollum said to the Union that he was concerned about the pensions; that he felt that Delhi had offered everything possible to the Union and that he had believed that these termination pay and pension plan matters were the key to his securing a contract with the Union. There was some further discussion during which the Union referred to laboratory and warehouse employees. McCollum said that in none of the Hess plants were such employees in the Union (unit?) and he did not want it to be different at the Corpus Christi refinery. Brown proposed that Hess take over all the Delhi employees with their seniority and that he would recommend that the employees pay over to

[34] The release, which the Union did not sign, referred to the sale of the refinery to Hess, effective April 1, 1963; that Delhi was terminating the employees in accordance with the terms of the Delhi contract; it referred to the payments of termination and vacation pay by Delhi and the arrangement regarding pensions and sick leave and stated that no grievances were to be instituted against Delhi after 6 a.m., April 1; the release stated that the Union agreed to the cancellation of the Delhi contract as of April 1. After the union meeting on March 28, Delhi was advised by the Union that it had rejected the request for contract termination.

Hess what they had received in termination, vacation, and pension payments from Delhi, and Hess would then follow the vacation and pension provisions of the old contract. McCollum refused and said that he had no further changes in his position and had made his last effort with the Union in his proposal on March 25. He pointed out that Hess was a young progressive company with a good future and that the employees would have much more security with Hess then they had had in the past.[35]

McCollum sent a telegram to the Union on March 29, confirming that Hess was not assuming the Delhi contract and stating that Hess had bargained with the Union in an effort to arrive at a contract and that it would continue to do so. The telegram advised where McCollum could be contacted and stated that Hess would receive applications for employment from employees to operate the refinery, commencing on April 1, 1963. Later, in response to the Union's request, McCollum agreed to meet with the Union on April 1. On April 1, the employees were terminated. They then had received Hess employment applications and had filled them out. Beginning on April 1, they submitted the applications together with letters stating that the individual signatory requested that the letter be considered as his "unconditional application for employment . . . in either my former job at your Corpus Christi refinery or in any available job at the refinery. This is an unqualified, continuing application * * *."

At the meeting on April 1, Brown offered the employees for employment at the refinery. McCollum said that the Union had not kept its word that Hess would get a con-

[35] McCollum also gave the Union a letter and asked that it be signed. It was dated March 25, 1963. The letter reiterated, in substance, the terms previously proposed by McCollum, including some details of various items that possibly were not theretofore in written form.

tract and that Brown had personally told him that if McCollum could clear up the matters between Delhi and the Union the Union would sign the contract last submitted by McCollum. McCollum said that he had picked up a $50,000 tab for termination pay on this assumption. Brown denied having assured McCollum that the contract would be signed. Brown said that if he had led McCollum to believe that he would get a contract it was because Brown believed in the effectiveness of collective bargaining that would result in an agreement. McCollum said that he had no crude oil[36] scheduled for the refinery and that he was now withdrawing his last contract proposal. He stated that there were many things in that proposal that were not what he wanted but were concessions made in an effort to avoid closing the plant. Since agreement had not been reached he was withdrawing his proposal and would submit a new proposal later. He said that he would give consideration to any union proposals. The Union said that it would work on one for presentation to McCollum.[37] Brown said that the men desired to work for the Company. McCollum said he was leaving and did not know when he would be back in Corpus Christi.[38]

On April 5 Brown wrote to McCollum. He referred to the "lockout" of the employees; he referred to the Company's statements about willingness to continue negotiations; he offered a written no-strike pledge for 90 days to insure uninterrupted production during further negotiations; he urged that the refinery be reopened and that the employees be hired or reemployed on jobs available or which become available; he asked that the Company bargain regarding any contemplated contracting-out of work, but stated that this

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[36] The raw material for the refinery.

[37] So far as appears, the Union did not present any proposed contract instrument to McCollum.

[38] Hess' and McCollum's offices were in Perth Amboy, New Jersey.

did not limit the above-mentioned unconditional tender of the employees; he stated that the Union was ready to meet and bargain at any time.

The parties met on April 12. The Union reaffirmed the contents of its April 5 letter. It asked McCollum if he would reconsider the Union's offer of a 90-day no-strike pledge and reemployment of the employees. He said that he would not. At the meeting McCollum had a letter, dated April 12, that was his reply to the Union's letter of April 5. The letter denied the allegations of a lockout; it said that the Union was apparently trying to put the Company in the position whereby the latter became obligated for large sums of money for products and in marketing arrangements, with at best a temporary labor agreement; the letter referred to the assurance from Brown about getting a contract if the Delhi matters were disposed of and of the $50,000 expenditure of Hess in connection therewith; it stated that the writer had repeatedly told the Union that the Company could not secure crude oil at favorable prices on a short-term basis and that 1 year was the minimum needed; reference was made to the company offer to employ all employees at the Delhi plant, subject to a 60-day probationary period; it was stated that gasoline could be purchased in the Corpus Christi area at a price cheaper than the Company could manufacture gasoline; a meeting was proposed.

At the April 12 meeting the Union asked McCollum if he was willing to drop his demand for the exclusion of laboratory and warehouse employees. He said, no. The Union inquired as to which employees would be hired by Hess. McCollum said that he did not know at that time. McCollum said that he had a new offer to make to the Union and submitted a proposed contract. The Union said that it would consider the proposal.

The parties met again on April 23 and went over the proposal submitted by McCollum on April 12.[39] In reply to a question, McCollum said that on laboratory and warehouse employees he would only bargain as to whether they would be represented by the Union.[40] McCollum said he would insist on the 4-month probationary period. He was asked whether he would recognized stewards and he said, no, that he would recognize union representatives as set out in the contract proposed. McCollum said that he would not agree to a single line of progress in the Process Department. He stated that seniority would depend on the date he hired the employees. The Union asked if McCollum would return to his March 25 proposal and bargain on that rather than on the April 12 demands, which the Union characterized as punitive. McCollum refused. Other items

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[39] The proposal was a complete contract instrument that was in some respects not unlike the earlier March 25 proposal. The April 12 instrument, as to contract term, read: "This agreement shall be effective from midnight, — 1963 to midnight — 1965 . . ."; it excluded laboratory and warehouse employees; it provided for the preparation of complaint and grievances by an employee or employees or by a member of the Workmen's Committee, whereas the Delhi contract and the March 25 proposal provided for the presentation of the grievances or complaint through the shop steward (the Workmen's Committee existed under all three contracts aforementioned and it was a union committee of employee members); it provided a 4-month probationary period for all employees; it provided the same classifications as the March 25 proposal; the progress chart showed two lines of promotion for the Process Department and this was the same as the March 12 proposal, as contrasted with that of March 25 which showed only one line of promotion in the Process Department; unlike the earlier proposals, that of April 12 did have a provision dealing with contracting out of work and provided that the Company could contract out "if such contracting out is not for the purpose of depriving regular employees of work"; the wage reopening provision did not exclude the wage reopening situation from the application of the contract's general no-strike clause; wage increases were to be in accordance with increases given by five other companies in the area.

[40] Apparently, whether such employees would be covered by the contract and thus represented by the Union.

were discussed. In this and in earlier company proposals the lowest classification was "yardman." On April 23 the Union asked if the janitors would be returned as yardmen. McCollum said that the janitors would be classified as office or clerical employees. The Union asked about pensions for employees. McCollum said that he was not concerned with pensions and knew nothing about them. The contract said nothing about pensions and there is no evidence of a separate pension trust agreement as was evidently the case under Delhi.

On April 26 the Union answered the Company's April 12 letter, made various accusations, and, in substance, stated that it became apparent that the lockout was being used to compel the Union to sign a contract giving the Company virtual unilateral control.[41]

Evidently, on about May 1 there was a meeting in Houston in which counsel for both parties participated as well as Forrester, regional director of the Union, and McCollum. Brown and the union plant committee did not participate. There was considerable discussion about McCollum's proposed probationary period. Forrester expressed the view that it was not needed but conceded that McCollum could get rid of any "goof-offs"; he said the Company did not need 60 days nor a completely free hand since under the latter it might let all the employees go. Forrester asked McCollum for the number of people he planned to let go and that maybe they could work out some understanding. McCollum testified that although he had such a number in mind at the time he did not tell Forrester but said that it was possible that something could be worked out along those lines and that he wanted to secure some more information and then would give the Union a number.

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[41] On April 2 the Union had filed its unfair labor practice charge against the Company. An amended charge was filed on April 29 and the complaint issued May 15.

McCollum telephoned Brown on May 6, 1963, and asked him to come to his office. Brown and McCollum met on that day. McCollum said that he was not meeting with Brown for collective-bargaining purposes but that he had some information to give Brown personally. McCollum said that he was going to put the refinery back in operation and that the employees would be used initially for a turnaround primarily.[42] McCollum said that there were nine named employees who were not going to be taken back.[43] One of these, referred to by McCollum, had reached retirement age and would be retired under the Delhi pension plan. The other eight had physical defects revealed by medical examinations. McCollum showed Brown a kit that contained a set of working rules and conditions of employment in which there was no reference to the Union.[44] McCollum said that the kit would be given to the returning employees. The kit likewise contained a copy of the insurance plans of Hess, for which the employees would be eligible, and an authorization blank authorizing payroll deduction for the insurance if the employee wished. Brown said that he had no

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[42] Refinery equipment from time to time requires overhauling. Corrosion and other factors affect the various units. The process of overhauling is referred to as a turnaround and the unit is not operational during this period. If the turnaround is not made seriatim on units one at a time, it may be general, i.e., all units are turned around in the same period. A turnaround is over and above day to day maintenance.

[43] The complement of the refinery unit on March 31, 1963, was slightly over 200.

[44] The topics covered in the rules and conditions were: Hours; Wages; Vacations; Changes in classification of work; Benefits; Physical examination; Termination notice, Seniority and promotion; Contract work; a list of the 11 job titles and basic wage rates; a progression chart. The various items in the rules and conditions were substantially those that had been in earlier contract proposals made by McCollum to the Union. The rules and conditions had no reference to union recognition, unit, grievance procedure, arbitration, and other matters directly involved in a union-employer contract.

question about the retirement action regarding one of the nine employees who were not being taken back but he had some question regarding two of the eight others. McCollum said that he personally was not familiar with the cases but if the men went to another doctor and secured favorable reports the Company would take another look at the matter.

By May 7, the former Delhi employees received letters from Hess requesting them to report for work.[45] Most of the employees were hired on May 7, according to Brown, and some, who could not report immediately, were hired a little later, excepting the nine persons that McCollum had mentioned to Brown.[46] Since May 7, Hess apparently has been operating the refinery, with respect to wages, hours, and conditions of employment, in accordance with its working rules and policy.[47]

There was a meeting of the parties on May 22. McCollum asked Brown for a list of the points on which they did not agree. Brown said that he would do so, subject to the quali-

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[45] These, of course, were the employees who had been terminated on April 1 and who had received termination and vacation pay.

[46] One aspect of the hiring of May 7 is referred to in Respondent's Exhibit 3, a letter, dated May 7, 1963, from Brown to McCollum. *Inter alia,* it was stated therein:

> In our April 22, 1963 negotiations, you explained . . . that the omission of the classification of "Janitor" in your April 12 proposal meant that your company proposed to reclassify these Negro Employees as office personnel. As you remember, we opposed this action, which would have resulted in removing them from the recognized bargaining unit. We requested that they be reinstated in your proposed higher paying classification of "Yardman," along with white employees in that classification. We are glad that you granted our request and today reinstated the Janitors as Yardman. * * *

[47] Brown testified without contradiction that, during a recess of the first day of hearing, June 18, 1963, McCollum told him that he no longer wanted the 4-month probationary period.

fication that if the Union did not secure what it wanted on the enumerated points it would have the right to renegotiate additional points. Brown then named the disputed issues as: 60-day probationary period; laboratory and warehouse exclusion; the term of the contract; wage reopener clause; classifications; contracting out work; seniority; vacations; sick leave; staffing of the plant, i.e. the number of employees. As to the probationary period, McCollum's testimony on this point sheds no light on what he told Brown on May 22. The indication is that McCollum probably adhered to his prior position. It was on June 18, 1963, that McCollum told Brown that he no longer wanted the 4-month probationary period. At the hearing, McCollum testified, regarding his position on May 22 with respect to the probationary period, "We have accomplished pretty much what we wanted to accomplish with the 60-day probationary period because we have now been operating between five and six weeks . . . as far as I am concerned . . . that is behind [me]. . . ." As mentioned, this does not show McCollum's position on May 22. On laboratory and warehouse employee exclusion both parties apparently held to their respective positions although they again discussed the matter. With respect to contract term, the union position was for a 1-year contract, Brown saying that this was the policy of the International Union and he did not know that he could get an exception. Apparently McCollum was not agreeable to a 1-year period. On wage reopener the Union wanted the clause in the Delhi contract or a similar one. McCollum felt that his offer of guaranteed increases based on the industry pattern was adequate since Hess had such provisions in its Houston and New Orleans contracts. The parties discussed classifications but did not alter their respective positions, with the Union being opposed to the change proposed by the Company. On contracting out work no agreement was reached. McCollum stated that the only proposal

ever made by the Union with respect to the Company's proposal on contract work was that the Company would agree to require any contractor to pay the same rates to its personnel as were paid under the Union contract with the Company or to engage a contractor who paid the Union's rates. On seniority, with respect to progression, the Union wanted one line and the Company at one time agreed but then went back to two lines of progression. Apparently, on May 22, McCollum agreed to one line in the Process Department. On vacations, McCollum testified, the Union wanted a full vacation in 1964. No agreement was reached on this. According to McCollum, "In the original proposal we had offered two weeks pay this year and two weeks vacation in 1964. Under our new, our latest proposal, we had offered a prorated vacation in 1964 to be accumulated from the date of any contract we entered into until January 1, 1964. So if it was June 1, they would have half a vacation coming. Sick leave . . . we had offered ten days in our original proposal . . . from April 1 to December 31 [1963] . . . we eliminated that in our last proposal and said that we would not give sick leave until after one year's service. We had eliminated a proposal from the old contract that would cover six months at full pay for industrial accidents . . . at this meeting [May 22] we agreed to compromise the six months to three months . . ." In response to the Union's request as to the complement of the plant, McCollum said that ". . . if it was understood that I would not be held to these figures, I would give them what I thought, and at that meeting I gave them some approximate figures."

On May 28, 1963, the Union wrote to McCollum, referring to the May 22 meeting, "wherein you reiterated the demands you might heretofore made on the Union except that you indicated that you might agree to lay off no more than twenty (20) employees without regard to their length of

service in this same plant. For your information, the Union cannot agree to your demands. The Union further believes that your employees are entitled to work under a contract that more nearly meets the standards that these same employees enjoyed under the contract between Delhi-Taylor Oil Corporation and this Union and contract standards that more nearly equal the standards enjoyed by employees of other Refining Companies in the Gulf Coast area. . . . . Please let us hope that you will reconsider your demands and that we may come to some agreement."

The Janitors

Although the matter of the janitors has been heretofore mentioned, we will consider it more fully at this point. For many years there has been a janitor classification at the Corpus Christi refinery. The janitors, about six in number, have always been Negroes.[48] Since the inception of the Union at the refinery, the bargaining unit has included janitors and the Union has negotiated on their behalf.[49] The job progression chart in the Delhi contract, as well as in prior contracts, starts at laborer and progresses to yardman and thence to higher classifications. Janitors do not appear on the progression chart.

Respondent called two janitors, Johnson and Jones, as witnesses, and it was stipulated that two other janitors, Tilley and Ray, would testify to the same effect. Johnson

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[48] Johnson, a janitor who testified at the hearing, has worked at the refinery since June 1940. He was number 6 on the Delhi seniority list.

[49] The basic wage rate for the three lowest paid classifications in the Delhi contract were: Laborer $2.04; Janitor-$2.10-2.32; Yardman-$2.41. Johnson testified that when he started at the refinery he earned $.30 per hour and was receiving $2.61 at the time of hearing. He had received wage increases in the course of his employment. He was employed by Hess on May 7, 1963, as a yardman. Hess did not have a janitor classification under its operating plan.

joined the Union at its inception in 1941. He attended meetings. At various times in the 1940's and 1950's he spoke to union committeemen about advancing his wages and progressing in classification. Apparently Johnson did not receive any definitive answers but one of the committeemen said that he was sorry that Johnson was caught "in the minority side" but advised Johnson to stay in the Union for protection against discharge. Another committeeman, when asked by Johnson whether it was the Company or the Union that was discriminating against him, said that he did not know. Although he testified that the Union did nothing about his inquiries, Johnson remained in the Union until 1958 or 1959. He testified that he dropped out of the Union when all dues were raised in 1958 or 1959. He stated that he had never filed a grievance nor had he bid on a higher job.

Jones had worked at the refinery since 1952. He was a member of the Union about 7 years and he attended one meeting. He believed that he left the Union in 1961. Jones stated that in 1961 he had informed a union committeeman, Fawcett, that he had performed pipefitting work for 8 years at the naval base and asked Fawcett about being promoted. What, if any, answer Fawcett gave at the time is not clear. Apparently shortly thereafter, Fawcett advised Jones to get out of the Union since it was not doing him any good. Jones said he was paying dues and would like to stay in. Fawcett said that he would take Jones over to the company office so he could get out of the Union. He did so, and Vick, an office employee of Delhi, prepared a letter for Jones' signature whereby Jones advised the Company that he was thereby withdrawing his membership from the Union.[50] Jones states that sub-

[50] Evidently the communication, addressed to the Company, would stop the checkoff of dues from Jones' pay.

sequently another union official had tried to persuade him to rejoin the Union but he had declined because he did not think that he had received a fair deal. The witness said that he had never spoken to the Company about securing a higher job and that he had never put in a bid for such a job nor had he filed a grievance.[51] Jones was hired by Hess, in May 1963, as a yardman.

In its answer to the instant complaint Respondent states that the Union has not represented all employees in the unit for purposes of collective bargaining but has discriminated against certain employees as to job classification, progression, wages, and other conditions; that the Union in negotiating with Hess has requested Hess to enter into a contract identical to its prior discriminatory contracts and that such a contract would be violative of the Act and of Executive Order No. 10925.

McCollum testified that sometime between March 20 and 25, 1963, he decided that it was impossible for Hess to adopt the Delhi contract with the Union and that the janitor situation was a factor in this determination. He states that he realized that the janitor classification did not appear on the contract's job progression chart and that the janitors were Negroes. McCollum asserts that he was mindful of Executive Order 10925 since Hess had Federal contracts.[52]

Admittedly, McCollum at no time called the matter of the janitor exclusion from the job progression chart to the attention of the Union during the series of bargaining meetings. The matter was not discussed at these meetings and had never been raised as an issue by either party. Mc-

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[51] There is no evidence that Johnson or the others had spoken to the Employer about promotions.

[52] Respondent's answer to the instant complaint states that Respondent did not become aware of the alleged discriminatory aspect of the Delhi contract with the Union "until shortly after April 1, 1963."

Collum testified that he did not want to stir up the situation and had decided that the best thing was to correct the situation and have no discussion thereon. The record shows that in all McCollum's written contract proposals to the Union the job progression chart started at the "yardman" classification and progressed upward. The "laborer" and "janitor" classifications in the Delhi contract did not appear at all in McCollum's proposed charts. The Union did not take issue with McCollum about the charts because of the disappearance of the laborer and janitor classification although the most logical interpretation for anyone viewing McCollum's charts was that he was eliminating laborer and janitor classifications and apparently having one bottom classification, yardman, and that classification was on the chart.[53] The first mention of janitors in the negotiations was on April 23, 1963, when the Union asked whether the janitors would be returned to work as yardmen. McCollum at that time said that they would be returned as office or clerical employees. The Union evidently opposed this action since it would remove janitors from the unit, and apparently urged that the janitors be employed as yardmen. Subsequently, on May 7, the janitors were employed by Hess as yardmen.[54]

As far as appears the only other time that the janitor matter was raised was in a meeting between counsel for the two parties sometime around the middle or latter part of April 1963 or possibly May. The evidence regarding this discussion is so slight that it is probably fair to say that Respondent's counsel made basically the same assertions

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[53] The issues between the Union and McCollum on the job progression charts proposed by McCollum were the questions as to the number of lines of promotion thereon, including, whether there should be one or two lines of promotion in the Process Department.

[54] In the foregoing connections, see the union letter of May 7, 1963, Respondent Exhibit 3, and McCollum's reply of May 10, Respondent Exhibit 4.

made herein regarding discrimination, as described above, and that the union attorney denied the allegations. At the time of filing its answer in the instant case Respondent filed an unfair labor practice charge against the Union that apparently was based substantially on the matters used as part of the defense in the instant case, namely union discrimination and refusal to bargain.[55]

In its letter to McCollum on May 7, 1963, referred to above, the Union also stated that the Union, international and local, had a policy of nondiscrimination on the ground of race, color, creed, or national origin.

We now propose that this policy be included as a provision in any collective-bargaining agreement we sign with your Company. In addition, this Union further proposes that your Company promote, in accordance with seniority, all Negro employees in the bargaining unit to whatever bargaining unit jobs they are qualified to perform.

> Furthermore, this Union stands ready to affirmatively cooperate in the implementation of policies and provisions of Executive Order #10925, and we agree that recruitment, employment, and the terms and conditions of employment of employees of the Company shall be in accordance with the purpose and provisions of that Order.

The foregoing is in the record and at the hearing officials of the Union affirmed a policy of no discrimination. The Examiner finds no reason why he should not accept such declarations of policy as valid. Since, as will appear hereinafter, the Examiner is of the opinion that the Delhi contract was not assumed by Hess and that Hess was not legally obligated to assume that contract, the rights and wrongs that many have arisen by reason of that contract

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[55] This charge by the Employer was under investigation by the Regional Office of the Board, according to the General Counsel.

and that may or may not still exist because of past factors are matters of contract law or otherwise, and are for some authority other than the Examiner to adjudicate. As far as the issues in the instant case are concerned, the Examiner is of the view that the treatment of the janitors or their inclusions or exclusion from the job progression chart were not collective-bargaining issues between the Union and Hess and they were not the issues that separated them. If the exclusion of the janitors from the progression chart in the Delhi contract was one of the reasons Hess would not assume that contract, it was not the principal reason. Indeed, it was never stated as a reason to the Union during the bargaining meetings nor is there any basis for concluding that, if the matter was an issue preventing agreement, either with respect to provisions of the old contract or with respect to the provisions of a new contract, it would not have been speedily resolved by both parties. Both parties appear to be committed to non-discriminatory principles and if past situations call for attention, the jurisdiction thereof does not rest in the Examiner, if for no other reason than the fact that neither the Union nor Delhi, the former employer, are Respondents before the Examiner.

Conclusions

As mentioned heretofore, the Examiner is of the opinion that the Delhi contract was not binding upon Hess and is further of the opinion that Respondent was within its legal rights in refusing to assume the obligations of that contract. As of April 1, 1963, when Respondent became the owner of the Corpus Christi refinery, the wages, hours, and working conditions, as well as the other attributes of ownership, that were to prevail at or with respect to the refinery, were within Respondent's control. This control that rested in Respondent was subject to the provisions of the

applicable sections of the Act, principally Section 8(a)(1), (3) and (5) thereof. The Union was the collective-bargaining agent of the employees in an appropriate unit. The terms on which the refinery would operate with respect to the employees were subject to bargaining between the Union and Respondent. If the bargaining obligation was fulfilled, the terms on which the refinery would be operated would either be the terms of a contract on which the parties had mutually agreed or the terms and conditions would be those that Respondent had proposed. If the parties were unable to reach agreement after bargaining in good faith, the terms proposed by the Union would prevail, if at all, only by the threat of the use of, or the actual use of, whatever economic power that the Union possessed.

Without repeating here the details of the negotiations between the parties, the Examiner is of the opinion that both parties wanted to negotiate a contract. Their problem was that they differed substantially as to major items in the contract. They were firm in their major positions and the bargaining can be described as hard bargaining. The Union rejected the Respondent's contract proposals and Respondent would not agree to what the Union desired. In the last mentioned connection, the evidence persuades the Examiner that the Union basically wanted the Respondent to adopt the terms of the Delhi contract or the provisions of that contract that the Union considered essential to protect its employee members. On major issues the parties were discernably apart and as far as appears they never came close to agreement.

The Examiner has considered the various facets of the negotiations, including the fact that some of Respondent's later proposals were less favorable, from the Union's standpoint, than earlier proposals. This might have been of significance if the Union had given any

indication that it was at any time prepared to accept any of the original major proposals of Respondent but at no time was this the fact. Nor were meaningful counter proposals made by either party on important issues to indicate that each or one of them was prepared to depart from its position to a point somewhat approximate to the opposing position. It is not the function of the Examiner to pass upon the quality of the substantive terms proposed by the parties in their contract negotiations or to express his judgment as to the fairness or unfairness of their positions or to conclude that either or both parties should be more yielding as to their requirements.[56]

The negotiations were no doubt complicated by the presence of two employers on the scene until April 1, 1963. The Union was understandably concerned with the pension and other rights of the employees under the Delhi contract. Initially, at least, the relationship of Delhi and Hess was not clear to the Union. The Examiner believes that there was a misunderstanding between Brown and McCollum on the matter of whether the only thing standing in the way of agreement on Respondent's proposed contract was the settlement of the Union's claims against Delhi. But these various factors do not alter the fact, previously mentioned, that whatever were the Union's contractual rights against Delhi, the terms that would govern the relationship between Respondent and the Union had to be arrived at through the bargaining process.

The Examiner is of the opinion that on the record made in this case the appropriate bargaining unit, previously referred to in this Decision, included laboratory and warehouse employees. If the Union had agreed with Respondent's demand for the exclusion of laboratory and ware-

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[56] *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395.

house employees from the unit, there would never have been an issue as to the matter, at least between the contracting parties, and quite probably the issue would not otherwise have arisen.[57] However when the Union refused to agree to the exclusions, Respondent insisted on its position that the categories aforementioned be excluded. *An impasse was reached on this as well as on other issues.* The examiner believes that Respondent's insistence, to the point of impasse, on exclusion of employees from an admittedly appropriate unit, placed Respondent in an untenable legal position and that such conduct was violative of Section 8(a)(1) and (5) of the Act.[58]

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[57] Possibly remote, but at least potential would be a situation where a rival union sought to represent the refinery employees and filed a representation petition with the Board. The incumbent union and the employer might claim that their contract barred the petition. The petitioning union might counter with the contention that the contract unit was inappropriate because of the aforementioned exclusions and hence the contract was no bar. The outcome would depend on the evidence presented on the issue, quite possibly in a Board hearing. Another factor would be the possibility of a Section 8(b)(1)(A) unfair labor practice charge against the union and a Section 8(a)(1) charge against the employer by individuals affected by the exclusion of warehouse and laboratory employees from the contract unit. Here again, the evidence would determine the outcome.

[58] Respondent's reasons for wanting the exclusions were the fact that such employees were not covered by its other union contracts elsewhere; also, Respondent, while basing the laboratory employees at the Corpus Christi refinery, stated that it planned to detail them to other locations from time to time and that it would remunerate the laboratory people accordingly; as to the warehouse, Respondent said that it planned to reduce the number of such employees and give the warehouseman more recordkeeping duties. Respondent, of course, could have filed a representation petition with the Board in order to have the unit issue resolved (Section 9(c)(1) of the Act) or it could have proposed that the Union file such a petition; or the employees affected could have filed a petition although there is not the slightest evidence that the employees in question desired exclusion from the bargaining unit or that they did not wish to be represented by the Union.

We come now to the shutdown of the refinery from April 1 to May 7, 1963. As the Examiner views the evidence, the refinery was shut down and the employees were terminated on April 1 by Delhi. Delhi took this action for a very evident reason, to wit, Delhi ceased to be the owner of the refinery on April 1 and had no right to operate the plant and had no work for the refinery employees. It is equally clear to the Examiner that if Respondent had said to Delhi, terminate the employees on your records or show them as transferred to Hess as of April 1, and let Hess take over the plant on April 1 in an operating condition, this would have been done. The original contemplation of Delhi was that Hess would not only take over the refinery in an operating condition, but would also take over all or most of the employees, as well as assume the union contract. Hess, however, made it clear that it was not assuming the existing contract. With this exception, however, Hess was planning to, and was prepared to, operate the refinery on April 1. Hess had retained for the purpose, Maurer, the vice president of manufacturing of Delhi, as well as Warnke, the plant manager under Delhi. Various foremen and other office personnel were also retained. The evidence leaves no doubt in the Examiner's mind that if the Union had accepted the contract proposals of Hess at any time up to March 25 or even March 28, 1963, Hess would have operated the refinery with the former Delhi employees, subject to provisions of the Hess contract with the Union. Indeed, Respondent had admonished the Union that if it did not accept the Respondent's contract proposals the refinery would be shut down on April 1.

In the light of the foregoing, the basic fact with which we must deal, is that the refinery did not operate from April 1 to May 7, 1963, and the employees constituting the normal work force of the refinery did not work during this period, because of a decision made by Respondent.

Respondent made the aforementioned decision not to operate because the Union had rejected its contract proposals.

It is Respondent's position that Delhi had operated the refinery at a loss and that if Respondent had operated the plant from April 1, 1963, on the same basis as had Delhi, Respondent would have lost substantial sums of money, about $101,920 a month. Respondent asserts that in order to operate the refinery on a profitable basis it had determined that certain purchasing policies regarding raw material, crude oil, and certain other operating economies had to be effectuated. In order to accomplish the foregoing objectives, Respondent asserts that it prepared contract proposals for the Union and had warned the Union that unless the contract was accepted by March 25, 1963, the refinery would cease operations on April 1, or, otherwise described, Hess would not operate the refinery beginning on April 1. Since the Union rejected the contract proposed by Respondent, the predicted shutdown or nonoperation of the refinery ensued.

To support its assertions that Delhi had been losing money in operating the refinery, Respondent relies on the Delhi financial report to the stockholders in 1962, which has been previously discussed in this Decision, as well as Respondent's Exhibit 9, Earnings Forecast for Second Quarter, 1963.[59] This Exhibit 9 is a projection prepared by Respondent to show the losses that would have been incurred from April 1, 1963 to June 30, 1963, if Respondent had operated the refinery on the Delhi basis.

Respondent's position, further amplified, was that with a 2-year term for its proposed contract it could make long term contracts for the purchase of crude oil and could thereby secure the crude oil at lower cost than would be

[59] Hereinafter referred to as Exhibit 9.

the case with short term purchase contracts. The 2-year contract term would also insure continuity in refinery operation not only because the Union would be bound to the term of the contract but also because the contract contained a no-strike clause. Additional economies would be accomplished by reason of other provisions or conditions of Respondent's proposed contract, such as a free hand in weeding out undesirable employees, reducing the number of classifications, and so forth. With the rejection of the contract by the Union, according to Respondent, it was obliged not to operate the refinery if it was to avoid the Delhi type losses as shown in the Delhi financial report and in Exhibit 9.

We will assume, arguendo, at this point, that Respondent's contentions aforementioned concerning losses and the economics of the situation are correct, and that the refinery could not be operated profitably except in accordance with Respondent's proposed terms. The Examiner is of the opinion, however, based on the evidence and the circumstances in this case, that the Union and Respondent had reached an impasse on March 28, 1963. A point of impasse is not determined by the quantity or number of meetings between the parties but by the quality or contents of the negotiations, the surrounding circumstances, and by the approach of the parties to the bargaining issues. By March 28, Respondent had submitted its contract proposals to the Union, orally and in writing. The proposals, had been discussed and explained. Respondent had expressly stated to the Union that its proposals were not simply bargaining positions but that it had to have exactly that for which it was asking. Respondent expressly told the Union that if its proposed contract was not accepted by March 25 the refinery would shut down on April 1 and would not operate. The Union did not accept any of Respondent's major

proposals and manifiested its rejection thereof. For instance, on March 18, the Union took the position, *inter alia*, that it would have to represent warehouse and laboratory employees; that the contract would have to protect the employees against the contracting out of work; that there should not be a probationary period for employees during which grievances could not be filed; that the contract should be for a 1-year term. At none of the meetings was agreement manifested or was agreement approximated on the foregoing or other major issues. Respondent adhered to its basic proposals. On March 18 and at other times the Union proposed that Respondent assume the Delhi contract. Respondent submitted a complete contract to the Union and despite warnings of the shutdown of the refinery as a consequence, the Union, after consideration by its committee and a vote of the membership, advised Respondent in writing that the members "have voted overwhelmingly not to accept the proposal . . .". Further efforts to reach agreement, including Respondent's assumption of half of the Delhi termination and vacation pay obligations under the Delhi contract, were unavailing. If there was any doubt of the deadlocked nature of the bargaining, it is dispelled by additional events. On March 28, the positions of the parties were fundamentally unaltered. The Union was not prepared to accept the basic proposals of Respondent and Respondent was not prepared to drop its requirements. Respondent stated that it had made its last and, apparently, from Respondent's standpoint, its best effort, in its March 25 contract proposal that the Union had rejected and still rejected.[60] The impasse and deadlock is underscored by the fact that with the closing of the re-

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[60] All subsequent contract proposals by Respondent were less favorable to the Union than the March 25 proposal and Respondent subsequently refused to return to the March 25 proposals as a basis for negotiations.

finery all the employees represented by the Union were out of work and Respondent, instead of operating a refinery as it had planned and had intended, had a closed plant. These events brought no changes in the respective positions regarding the terms of a contract. Subsequent negotiations simply confirmed the fact of the March 28 impasse. The fact that both parties, after March 28 and April 1, were prepared to continue and did continue negotiations in an effort to break the impasse that was reached earlier, does not alter the validity of the conclusion that there was a impasse in bargaining at least by March 28.

Since we have adopted, arguendo, Respondent's contentions that it could not operate the refinery profitably on the basis on which Delhi had operated, but that Respondent could operate profitably on its own proposed terms and was prepared to do so if the Union had accepted those terms, there was no legal justification for the nonoperation of the refinery from April 1 to May 7, 1963. When the parties reached an impasse in bargaining by March 28, 1963, the law did not require that an employer in such circumstances should close its plant or that it was required to operate on the terms espoused by the Union. An employer, such as Respondent, in the circumstances described, could properly operate its plant under the terms proposed to and rejected by the Union.[61] Indeed, this is precisely what Respondent did, commencing on May 7, 1963. Admittedly, Respondent would have operated its plant on April 1 if the Union had accepted its proposals at any time by March 28. In the circumstances described, Respondent could have operated by placing into effect on April 1 its

[61] *W. W. Cross & Co.*, 77 NLRB 1162, 1165-1166, enforced, 174 F. 2d 875, (C.A. 1); *N.L.R.B.* v. *Intracoastal Terminal, Inc.*, 286 F. 2d 954, 958 (C.A. 5); *N.L.R.B.* v. *U. S. Sonics Corp.*, 312 F. 2d 610, 615 (C.A. 1); *N.L.R.B.* v. *Crompton-Highland Mills*, 337 U.S. 217, 224-225.

own terms and proposals. The agreement by the Union was no more essential to the operation than it was for the operation since May 7. There was no threat of a strike in this case. In fact, the Union repeatedly urged that Respondent keep the plant in operation and not close down on April 1 as Respondent had warned that it would do. On March 25, although it had rejected Respondent's contract proposals, the Union, in the same written message of rejection, stated that "The Union pledges not to strike and urges the Company not resort to lockout." During negotiations the Union never focused either its fire or even its attention upon the no-strike clause of Respondent's proposals. The Delhi contract had the same no-strike proposal as was contained in Respondent's contract proposals. Respondent itself did not focus attention during negotiations upon the no-strike clause. This was the situation on April 1 when Respondent refused to operate its plant on its own terms.[62]

The evidence persuades the Examiner that Respondent resorted to and used the nonoperation of its plant from April 1 as a means of compelling agreement by the Union to its contract terms. Respondent had first warned or threatened the Union that the plant would not operate on April 1 if agreement on the proposed contract was not forthcoming by March 25. The desire, on Respondent's

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[62] Occurrences subsequent to the shutdown on April 1 are not determinative of the facts and circumstances as they existed prior to, or on, April 1. After the shutdown, the Union, on April 5, proposed a written commitment of a 90-day no-strike pledge pending further negotiations. There was, however, no threat of a strike made and on April 1, after the shutdown, the employees, with the active support of the Union, made known their continued desire to work at the refinery. Since May 7, 1963, Respondent has of course had no trouble in operating although it has no contract and has no no-strike commitment from the Union for any period. As far as appears, Respondent not only had no trouble with the Union as aforedescribed, but Respondent had no problem in its own mind about starting to operate without a contract in May 1963.

part, for such an agreement is clear. When the warning and an expenditure of some $50,000 by Respondent regarding Delhi obligations to the Union did not accomplish the contract, then the nonoperation of the plant was placed in effect. The Examiner is of the opinion that it is likely that a long shutdown was not contemplated but that it was believed that the shutdown would speedily accomplish its purpose. In this case, the Examier is convinced that Respondent wanted a contract with the Union on Respondent's terms. Respondent had taken the initiative to secure such a contract and it exerted considerable effort to secure that contract. In many, if not in most employer-union situations, the Union takes the initiative to propose a contract and the employer, if the parties do not agree, is then quite ready to continue to operate without any contract. Because of the circumstances in this case it is the Examiner's opinion that from March 8 to April 1 and for some time thereafter Respondent was intent upon securing union agreement to its proposed contract and that the nonoperation of the plant was part of this effort. It was only later, when it became apparent that the closed condition of the plant had not accomplished its objective, that Respondent decided to operate the plant without a contract. This it did, beginning on May 7, 1963, and it operated along the lines proposed to the Union. The terms of the plant operation were Respondent's terms, which were as available to Respondent on April 1 as on May 7. The significant difference was that from March 8 to April 1 Respondent believed and hoped that it could secure, and strongly wanted, the Union's agreement to Respondent's proposed contract. When none of Respondent's efforts accomplished this objective, the plant was operated as it could have been operated on April 1.

Since Respondent was in a position to operate the plant on the terms that it had decided would avoid and cure the uneconomic type of operation under Delhi, it is actually unnecessary to become involved in the economics of the Delhi-type operation or in what would have happened economically (as projected in Exhibit 9) if Respondent had operated in the manner in which it never intended to operate, and in which it was not required to operate, and in which it never did operate. Further, Respondent was not faced with any type of a strike threat but was proferred assurances against a strike. Respondent's refusal to operate its plant in order to compel union agreement to Respondent's contract, was, under the circumstances, not a defensive but an offensive course of action. The Board has not accepted the proposition that the shutdown or the lockout is the counterpart to the right to strike or the strike, and has limited its acceptance of the weapon to defensive situations.[63] The Examiner is governed accordingly.

In the light of the foregoing findings and legal precedents, it is found that the Respondent's refusal to operate

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[63] *Duluth Bottling Association*, 48 NLRB 1335; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *International Shoe Co.*, 93 NLRB 907; *Somerset Classics, Inc.*, 90 NLRB 1676, 193 F. 2d 56 (C.A. 2); *Wallick & Schwalm Co.*, 95 NLRB 1262, 198 F. 2d 477 (C.A. 3); *Associated General Contractors*, 105 NLRB 767; *Quaker State Oil Refining Corp.*, 121 NLRB 334, 270 F. 2d 40 (C.A. 3), cert. denied, 361 U.S. 917; *Building Contractors Association of Rockford, Inc.*, 138 NLRB 1405; *Publishers Association of New York City*, 139 NLRB No. 107; *Utah Plumbing Contractors Assn.*, 126 NLRB 973, 294 F. 2d 165 (C.A. 10); *Buffalo Linen Supply Company*, 109 NLRB 447, 353 U.S. 87; *Leonard et al., d/b/a Davis Furniture Company* v. *N.L.R.B.*, 205 F. 2d 335 (C.A. 9); *Sidele Fashions, Inc.*, 133 NLRB 547, 305 F. 2d 825 (C.A. 3); *American Brake Shoe Co.*, 116 NLRB, 820, 244 F. 2d 489 (C.A. 7).

its plant from April 1 to May 7, 1963, constituted a violation of Section 8(a)(1), (3) and (5), of the Act.[64]

The Examiner's conclusions that (1) Respondent would have operated the plant on April 1 if the Union had agreed to Respondent's March 1963 contract proposals; (2) that, under the circumstances, Respondent could have placed its proposals in effect on April 1 without union agreement, substantially affects the significance of some of Respondent's assertions regarding the economics of the plant operation. However, we have carefully considered the entire record, and have made certain observations on the economic aspects.

In its answer to the complaint Respondent states that the shutdown of the Corpus Christi refinery was due purely to taking over the refinery for a turnaround and because of economics and that the union was advised of such fact

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[64] The expressed views in the *Dalton Brick* case, *infra.*; *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477; the Supreme Court's decision in the *Buffalo Linen* case, *supra*; and *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, present at least some challenge to the forces of reconciliation. In the present state of these decisions the Examiner would have been inclined to confine his finding of a violation, with respect to the Respondent's refusal to operate, to Section 8(a)(1) of the Act although for all practical purposes the remedy thereof would have been the same. Section 8(a)(1) proscribes interference with the rights granted by Section 7. We encounter "motive" and "good faith" in Section 8(a)(3) and (5), respectively. It is axiomatic that under Section 8(a)(1) an employer may not state to its employees that he will not operate his plant or that he will close the plant if the employees join a union. We submit that there is an inconsistency in proscribing such conduct, but, then when the employees join the union and bargain through the union as agent, the very purpose of joining a union, sanction the right of the employer to refuse to operate the plant unless the (employees) union relinquishes its bargaining demands and accepts those of the employer, absent special defensive circumstances. Cf. *N.L.R.B.* v. *Dalton Brick & Tile Corporation*, 301 F. 2d 886 (C.A. 5).

prior to the time the plant was shut down . . . when it [Respondent] commenced the turnaround, all employees of the former employer were employed who would accept such employment * * *

The turnaround began on May 7, 1963, and there is no claim or evidence to show that it could not have commenced on April 1, 1963, and that the plant complement would not have been substantially what it was on May 7, when Respondent employed substantially all the former Delhi employees. The persons who would be best informed as to the condition of the refinery units and the need of a turnaround were Maurer, vice president in charge of manufacturing (refinery operation) for Delhi, and Plant Manager Warnke, plus the various foremen and the operating and maintenance employees. Prior to April 1, the relationship between Maurer, Warnke, and McCollum on matters pertaining to the plant was a close one. At some meetings with the Union Maurer and Warnke wore a Delhi hat and at other times, together with McCollum, they wore a Hess hat. They were being retained to run the refinery under Respondent, so their judgment and capability was evidently acceptable. Respondent had equal access to the Delhi foremen that it was retaining and to the employees. Respondent's policy in its other plants was to have complete turnarounds of the same type as it had on May 7 at Corpus Christi.

Respondent offered testimony that sometime between April 1 and May 7 gasoline prices had advanced. But this would appear to be a normal aspect of the oil business and something to be anticipated from time to time. Gasoline prices move in both directions at various irregular intervals. The movement of the gasoline price after the shutdown did not cause the shutdown, and, had the plant been in operation, the advance in price would have had no material significance. Respondent was aware of the state of the

gasoline market when it purchased the refinery and its clear intention was to operate the plant before and without regard to any advance in gasoline prices after April 1. If the price of gasoline had advanced on April 2 or 3, after the shutdown, it is very doubtful, in view of the evidence in this case, that the plant would have reopened on these dates. The Examiner is not persuaded that the price of gasoline was the determining factor why the plant did not open on April 1 but did open on May 7.

The principal witness for Respondent, McCollum, at one point was explaining how the crude oil prices used in Respondent's projection of earnings for the second quarter, 1963, Respondent's Exhibit 9, were arrived at and why particular prices of crude were projected. He stated: "Crude oil postings change very seldom. So these postings were the postings in effect back in March [1963] when this [the projection] was made up."[65] In a later portion of his testimony, the witness, in stating that the economics of the situation had changed between April 1 when Respondent shut down the plant and May 7 when it reopened it, testified that a company had reduced its crude oil posted price so that Respondent was buying one type of its crude oil at 12 cents a barrel less than the March posted price. The posting aforementioned was reduced about April 4 or 5, retroactive to April 1. The signing of the contract by the Union on March 25 or 28 or earlier, to avoid the threatened shutdown on April 1, however, would have kept the plant operating before any drop in prices and the subsequent market conditions, whether up or down,

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[65] The projection was made under McCollum's direction by Buckley, products coordinator for Delhi, and two other men, at least one of whom came from Respondent's Perth Amboy plant. Buckley testified that the Exhibit, the projection, was prepared during the last week of March.

would have been the normal conditions of the business. Further, it is not clear why, prescinding from the March bargaining, if the drop in price of one type of crude oil was a significant factor in reopening the plant, the reopening was delayed for about a month after the price drop.

The witness, McCollum, testified at another point that "During this period of this projection, of course, we . . . have been shut down most of the time up to now, and we were able to buy [and did buy, as the witness later stated] 850,000 barrels of gasoline in the Corpus Christi area at ten cents a barrel less than we figure our costs if we make it at our plant." It is apparent from the above testimony, that the purchase situation mentioned occurred after the April 1 shutdown and even after the projection itself was prepared. Consequently, it would not have motivated the shutdown. Moreover, the purchase situation regarding gasoline occurred prior to May 7 when the plant reopened and commenced the turnaround preparatory to production.[66]

Other than as stated, there are no details in the record regarding the 850,000 barrels of gasoline referred to by McCollum. Apparently, since Respondent was not going to and did not operate under the Delhi standards but was going to and did operate according to its own economized purchasing, production, and marketing policies, and with lower crude oil prices, its cost of production were higher than gasoline that it purchased from a seller or sellers who presumably produced and sold their product at a profit. This, too, occurred when gasoline prices were advancing or had advanced, a condition that, at least according to classical free competitive market principles, would

[66] McCollum referred to the fact that it could buy gasoline cheaper than it could make it in its April 12 letter to the Union.

indicate rising or increased demand for gasoline in a seller's market. Perhaps it is better to buy gasoline at wholesale than to manufacture it. Whatever the foregoing indicates, the Examiner does not conclude that, in the circumstances of the case before him, it supports Respondent's defense as to the shutdown on April 1 and the reopening on May 7.

With reference to Respondent's Exhibits 9, 11, 12, the projection exhibits, they are principally based on Delhi's operation but plus some Hess elements. Under operating costs, a higher Hess depreciation figure is used on the same equipment than was used by Delhi. Apparently this is justified on the basis that Delhi was depreciating the equipment over a long period and Hess could then show a higher depreciation for the last period. But on operating expense, which would include wages, the Delhi figures are used although Hess reduced salaried personnel from 72 to 42 and contemplated other economies in operating expense. In fact, Respondent was requiring 2 months to 4 months to weed out personnel from the production and maintenance force. A more accurate projection for the second quarter would reject these economies. Respondent shows the various crude oils and their cost, plus a large volume of McComb crude that was not used by nor was it available to Delhi. The producers of McComb are three companies, one of whom is Hess. The price shown on Exhibit 9 for the McComb crude is the highest price of all the crudes so shown. In effect, this is a cost of raw material reflecting a sale by Hess to itself at a relatively high price. On finished products, the exhibit shows that the largest amount of gasoline went to Hess' own brand, and this gasoline shows the highest octane rating and the lowest price of the gasoline to

be sold.[67] If the price on this gasoline was further lowered the net loss shown by the exhibit would be higher, of course, and the reverse would also be true. Prices that may be responsive to a gasoline price war would not be normal prices over a long period. A lower price to Hess than to the other Customer for No. 2 oil is also shown and this product is not, as far as appears, a party to a price war.

If some of the less persuasive aspects of Respondent's projection for the second quarter are passed over, the projection is at most an argument for operating the plant on a somewhat different basis than did Delhi. But the Examiner, as previously mentioned, does not believe that Respondent was obligated to follow the Delhi modus operandi or to adopt the union contract or to prove by means of a projection that it used the Delhi figures, a loss would ensue.

Although Respondent has emphasized its departure from the Delhi past, it also appears that Respondent took over and assumed a number of Delhi contracts with third parties, both with respect to the purchase of raw materials from such parties and the supplying of manufactured products to such parties. The record indicates the nature of and the details of some of these contracts but regarding such contracts the record shows only that they were purchase and sale contracts assumed by Respondent in its agreement with Delhi. The paucity of information regarding certain of the aforementioned contracts arose in the first instance from Respondent's refusal to produce the same at the hearing.

The Respondent, as previously stated, had stressed the necessity of making long-term 2-year oil purchase contracts and has coupled with this the requirement for equal

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[67] Tetraethyl lead is a salient factor in the octane rating of gasoline. The projection shows a Delhi figure for such lead as $144,222 which Hess shows as increased for the second quarter to $154,700.

stability of labor relations during the 2-year period. The picture conveyed was that Respondent could not commit itself to a 2-year purchase contract if its plant could not be depended upon to operate without interruption for 2 years. It is to be noted, however, that on March 8, 12 and 25, 1963, the contracts proposed by Respondent to the Union included Article I of the Delhi contract. The change in the Article was limited to changing the date of the contract term from, March 12, 1962 — March 12, 1964, to, June 1, 1963 — June 1, 1965. Article I, however, provides for two wage reopenings, one, on 60 days' notice, "prior to the end of one year from date of this agreement," and the second, on 60 days' notice, "at or after one year from the date of this agreement and prior to the end of the second year." It is further provided in the same article that if the parties do not reach agreement on the matter of a general wage adjustment, within 60 days of the above wage reopenings, the no-strike provision of the contract is not applicable and the Union shall be free to strike. If the Union had accepted the proposed contract on March 8, 12, or 25 it could have given a 60-day notice of wage reopening on June 2, 1963 and if agreement was not reached within 60 days of its notice, it could have struck. The guaranteed stability for 2 years which Respondent states was necessary could therefore have been as little as 4 months under Respondent's own original contract proposals.

The contractual commitments for the purchase of raw materials and the sale of finished products, which Respondent asserts it was unwilling to undertake without absolute assurance of labor stability in its own plant, do not appear to have been as drastic as McCollum's testimony implied. A provision of a contract that Respondent took over from

Delhi regarding Kyso Sweden crude oil,[68] refers to Prevention of Performance. It reads:

> Neither party shall be liable for loss, damage, claims or demands of any nature . . . suffered by the other party due to defaults in performance . . . whenever performance in the customary manner is prevented by fires; war . . .; labor difficulties (whether or not involving a party's employees) . . . ; or any cause reasonably beyond its control . . . .
>
> The requirement that any cause be remedied with all reasonable dispatch shall not require the settlement of labor difficulties by acceding to the demands of the opposing party or parties. * * *

Buckley, products coordinator for Delhi and then for Respondent, was one of Respondent's witnesses. He testified after the aforementioned provisions were read into the record, that the performance clause was standard in all the contracts he had seen.

There are other indications in the record that Respondent was not in the rigid position that it claimed elsewhere in the record. Buckley testified:

> I understand that the crude swaps that Mr. McCollum testified to, that he was anticipating making, the long range crude contracts, that several of these were done, and that this laid this crude in during the month of June, that we did take it at a much more advantageous price.

Earlier testimony by McCollum regarding swaps and other matters in the oil business confirm the flexible and nonrigid

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[68] Kyso is Standard Oil Co. of Kentucky. Sweden is a type of crude oil. Kyso Sweden is listed on Respondent's Exhibit 9, the projection.

aspect of matters of purchase, sale, and trade in that industry. Thus,

> . . . most refining companies are buying crudes and sometimes they find themselves with cudes on a contract basis that through market changes or other things are not the most attractive crudes that they can find. But they are stuck with it on a contract.
>
> So, many times the crude trader for an oil company will be able to go out and trade that crude off to somebody else that has a plant where it fits a little bit better and get another crude in to fit the equipment we have to run the crude through out here, where you can make more money out of it . . . .
>
> So that we have been working on trades, of trading off crude oil as one crude against another . . . [The witness also explained that trades are made to save transportation costs. A refinery in Corpus Christi is, for instance, selling in Texas City and a Texas City refinery is selling in Corpus Christi. If each company was paying 12 cents a barrel transportation cost they might work out a trade, ". . . you trade the crudes and split the saving . . . so each company has made six cents a barrel by making a trade like this . . .".]

With respect to Respondent's contention that the employees' and the Union's request for reinstatement of the employees on April 1, 1963 after they were terminated earlier on the same date was not unconditional, the Examiner does not agree. The evidence previously set forth persuades the Examiner that the request was unconditional and that the employees and the Union wanted the employees to work as much on April 1 as on May 7 when they were given the opportunity to return. There never was a strike and no threat of a strike.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

With respect to the unlawful refusal to bargain, it is recommended that Respondent, upon request, bargain collectively with the Union and, if an understanding is reached, that such understanding be embodied in a signed agreement.

Since it has been found that the failure to operate the plant from April 1, 1963 to May 7, 1963, and the threat thereof, constituted interference with the rights of employees under Section 8(a)(1) of the Act and that the same conduct constituted a violation of Section 8(a)(3) and (5) of the Act, it will be recommended that Respondent make whole the employees for any loss of earnings they may have incurred by reason of Respondent's unfair labor practices. The payment to each of the employees will be of a sum of money equal to the amount he normally would have earned as wages from April 1, 1963 to the date of the offer of hiring, which was apparently on May 7, 1963, less his net earnings during the said period, with the computation on a quarterly basis,[69] and with interest as prescribed in *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716. It is also recommended that in the foregoing matters, suitable account is to be taken for the exclusion from the computation, in whole or in part, of any employee who by reason of age, physical condition or other legitimate factor, would not have been employed from April 1, 1963 to May 7, 1963 even if Respondent had operated the plant during that period.

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[69] *F. W. Woolworth*, 98 NLRB 289, 291-294.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of the Act.

2. By failure and refusal to hire the employees of the Corpus Christi refinery and to operate the refinery from April 1, 1963 to May 7, 1963 and by threatening to do the foregoing unless the Union agreed to Respondent's contract proposals or because the Union failed to so agree, Respondent has interfered with, restrained, and coerced the employees in violation of Section 8(a)(1) of the Act, and has discriminated against employees in violation of Section 8(a)(3) of the Act, and has refused to bargain in violation of Section 8(a)(5) of the Act.

3. The unfair labor practices affect commerce within the meaning of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions, and conclusions of law, and upon the entire record, it is recommended that Respondent, its agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening not to operate or refusing to operate its plant unless the Union signs a contract embodying Respondent's contract terms but without prejudice to Respondent's rights in accordance with legitimate business considerations.

(b) In any like or related manner interfering with, restraining, or coercing its employees, or discriminating against them, in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive bargaining representative of all production and maintenance employees at the Corpus Christi refinery, excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined by the Act, with respect to wages, hours, and other conditions of employment, and, if an understanding is reached embody such understanding in a signed agreement.[70]

(b) Make whole each of the employees deprived of employment from April 1, 1963 to May 7, 1963, in accordance with the standards set forth in this Decision under the caption, "The Remedy."

(c) Upon request, make available to the Board or its agents for examination and copying, all payroll records and other data necessary to analyze and compute the amount of backpay.

(d) Post at its refinery in Corpus Christi, Texas, copies of the notice attached hereto as an appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-Third Region, shall, after being duly signed by Respondent or his duly authorized representative, be posted immediately upon receipt thereof and be maintained for a period of 60 days from the date of posting in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to

---

[70] It is expressly noted that the Union professes and undertakes that its policy is to represent all employees fairly and equally without regard to race, creed, color, religion, or national origin.

insure that such notices are not altered, defaced, or covered by other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of service of this Decision, what steps Respondent has taken to comply herewith.

Dated at Washington, D. C. Nov. 18, 1963.

/s/ RAMEY DONOVAN
Ramey Donovan
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We WILL NOT threaten not to operate the Corpus Christi refinery nor will we refuse to operate the refinery if the OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, refuses to agree to and sign our contract proposals.

WE WILL, upon request, bargain collectively with the said union as the exclusive bargaining representative of all production and maintenance employees at the Corpus Christi refinery, excluding clerical employees, draftsmen, engineers, guards, foremen, assistant foremen, and other supervisors as defined in the Act, with respect to wages, hours, and conditions of employment, and, if an understanding is reached embody such understanding in a signed agreement.

WE WILL make whole each of the employees deprived of employment from April 1, 1963, to May 7, 1963, by payment to each of a sum of money computed in accordance with that portion of the Trial Examiner's Decision entitled "The Remedy."

DELHI-TAYLOR REFINING DIVISION, HESS OIL AND CHEMICAL CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002 (Tel. No. Capitol 8-0611, Ext. 296), if they have any question concerning this notice or compliance with its provisions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 973

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
HESS OIL & CHEMICAL CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are correctly cited in the Petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

Whether a Board finding that an employer was lawfully motivated in locking out its employees meets the substantial evidence test, where supported, in part, by the finding that the employer would have locked out the employees even if a nonmandatory bargaining issue had not been present in the negotiations.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*) are reproduced in the Petition at pages 2-3.

STATEMENT

This case involves a lockout by Hess Oil & Chemical Corporation (hereinafter referred to as "Hess" or "Company") to bring pressure upon the Oil, Chemical & Atomic Workers International Union (hereinafter referred to as the "Union") to modify its collective bargaining position.

On January 27, 1963, Hess executed an agreement with Delhi-Taylor Oil Refining Company to purchase certain of the latter's properties, including an oil refinery at Corpus Christi, Texas. On March 8, 1963, a representative of Hess met with representatives of the Union and advised them that Hess had purchased the refinery, that it would not assume the existing collective bargaining agreement, and that it was desirous of negotiating a new agreement (A. 36).[1]

Many issues were discussed during the subsequent negotiations, including a proposal by Hess to exclude the warehouse and laboratory employees from the bargaining unit. Failing to reach agreement on any major item, Hess locked out its employees on April 1, 1963 (A. 38-39).

The National Labor Relations Board issued an initial decision on September 16, 1964 (A. 44-47). In accordance with its prevailing rule that any lockout for the purpose of forcing acceptance of bargaining proposals was an unfair labor practice, the Board held the lockout violated sections 8(a)(1) and (3) of the Act. While the case was

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[1] All page references are to the Appendix to the Petition.

on appeal to the court below, this Court issued its decision in *American Ship Building Co.* v. *NLRB,* 380 U. S. 300 (1965), overruling the Board's position in prior lockout cases. At the Board's request, the court below stayed its proceedings to permit the Board to reconsider its decision in light of *American Ship Building.* Thereafter the Board made supplementary findings in this case, concluded that *American Ship Building* was dispositive and that the lockout was lawful, stating:

> In view of the foregoing and as the record indicates that Respondent was not motivated by union animus or in furtherance of an unlawful bargaining position, we find that Respondent's lockout did not violate Section 8(a)(3) or (1) of the Act. (A. 41).

Based upon a thorough analysis of the particular facts surrounding the case, the Board concluded that Hess's bargaining unit proposal did not affect the legality of the lockout. The decisive findings which the court below held were "unquestionably supported by substantial evidence" are:

> (1) the insistence on the exclusion of the warehouse and laboratory workers from the bargaining unit did not frustrate collective bargaining on other issues and did not contribute to an impasse on the other issues;
>
> (2) there was no evidence that Hess conditioned the signing of a contract upon the union's acceptance of Hess's proposal for the bargaining unit exclusion;
>
> (3) the union's rejection of Hess's contract proposals was due neither "solely" nor "primarily" to Hess's insistence on the exclusion of the warehouse and laboratory employees;
>
> (4) that Hess would have locked out its employees even had the bargaining unit issue been withdrawn from negotiations; and

(5) that the lockout was not prompted by anti-union animus. These findings are unquestionably supported by substantial evidence. (A. 31-32).

The court of appeals denied the Union's petition for review of the lockout issue, thereby affirming the Board's dismissal of the allegation of the complaint which the Petition here concerns.

ARGUMENT

The sole question for review, when reduced to its essence, is whether the Board's findings are supported by substantial evidence on the record considered as a whole, and that ". . . is a question which Congress has placed in the keeping of the Court of Appeals." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). The Union attempts to escape this fact by focusing the Court's attention on a single finding of the Board and then contending that the finding is "speculative" and insufficient under *American Ship Building Co.,* to support the conclusion that the lockout was lawfully motivated. The record is clear that the Board's conclusion that the lockout was lawful is grounded on the combination of findings enumerated above, and the Union's arguments for granting the writ fade when exposed to these additional facts.

I.

THERE IS NO CONFLICT WITH OTHER DECISIONS

The Union's argument begins with the false premise that the *sole* finding, underlying the decision of the Board and the court below was that Hess would have locked out its employees in the absence of the disagreement over the composition of the bargaining unit.[2] Based on that false

[2] The Petition calls this finding of fact a "theory" (Pet. 8).

premise, various arguments are made that the decision below is in conflict with other decisions and raises novel legal questions.

Contrary to the Union's contention, the Board clearly stated that its decision was based upon a combination of findings of fact, including findings that Hess's proposal was not designed to frustrate bargaining on other issues and did not contribute to the impasse on those issues, that the Union's rejection of Hess's other proposals was not due to the presence of the permissive issue, and that the lockout was not prompted by anti-union animus or in furtherance of an unlawful bargaining position (A. 40-41).

In reconsidering its original decision in the light of *American Ship Building*, the Board was particularly careful to conform its decision to the guidelines established therein (A. 40-41). In *American Ship Building* this Court held that it is entirely permissible for an employer to lock out its employees to foster its bargaining position if the employer's conduct was not motivated by anti-union intent, was not inherently destructive of union interests, and did not manifest hostility toward the collective bargaining process. The Board made the following detailed findings of fact in the present case, that conformed the Company's conduct here with those guidelines:

(1) the lockout of the employees was designed to bring economic pressure on the Union to compel it to sign a new contract (A. 38-39).

(2) the Company was not motivated by anti-union animus (A. 41).

(3) the Company did not take this action in furtherance of an unlawful bargaining position (A. 41).

(4) the record contained overwhelming evidence that demonstrates that the Company desired to enter

into a contract and engaged in good faith bargaining to that end (A. 37).

(5) the permissive issue did not cause the bargaining impasse between the parties and the Company was not refusing to sign an agreement on that ground and would have locked out the employees even if the issue had been withdrawn because they were far apart on all major issues (A. 37-38; 40-41).

(6) the permissive issue was not designed to frustrate the bargaining on other issues (A. 40).

The Union's claim that the decision below undermines the rule in *NLRB* v. *Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958), that bargaining will be impeded if this case stands, and the argument based upon an analogy to strike and discharge cases, as discussed under II of the Petition, are swept away by the *findings set out heretofore which are obviously pertinent, but omitted from the Petition.*

The argument ignores the salient findings of fact in this case. It is noteworthy that the same tactic employed by the Union here met with failure in *O.C.A.W. Local 3-89* v. *NLRB*, 405 F.2d 1111 (D.C. Cir. 1968). In that case the Union's argument that the lockout was unlawful was rejected because it was based upon an erroneous premise of the employer's *purpose* for imposing the lockout.

II.

THE DECISION BELOW IS CORRECT

The specific Board finding seized upon by the Union in an effort to gain review of this case was that "Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations." (A. 40). In mak-

ing that finding, the Board was merely applying the "but for" test as a practical vehicle to measure the Company's motive. The Board found that Hess's motive was lawful because the bargaining unit question did not cause the lockout. Unquestionably, the employer's motive was crucial to the decision in *American Ship Building*. Hence, it was not only proper, but necessary for the Board to inquire into Hess's motives in this case.

The thrust of the Union's entire argument is that the result of this test is "speculative," and therefore unreliable. This test, however, is customarily used by the Board where the determination of motive is required. In *NLRB* v. *Whitfield Pickle Co.*, 374 F.2d 576, 582 (5th Cir. 1967), the test was articulated as follows, "We reiterate that all that need be shown by the Board is that the employee would not have *field Pickle Co.*, 374 F.2d 57[illegible] (5th Cir. 1967), the test was articulated as follows, "We reiterate that all that need be shown by the Board is that the employee would not have been fired *but for* the anti-union animus of the employer." Certainly the application of that test to measure motive is not novel and its use in this case does not warrant granting the writ.

Semantics cannot convert the Union's simple disagreement with the Board's findings into some unresolved legal question, as the Union would have the Court believe. Contrary to the Union's claim, *American Ship Building* and *Borg-Warner* stand inviolate by the decisions below. The Board's findings are based upon the exercise of its expertise, an appreciation of the particular facts surrounding the negotiations and a consideration of the record as a whole. The Board's conclusion was reached by careful analysis of all the testimony, upon drawing inferences, and making credibility findings.

This Court has recognized that its function is not served by engaging in the review of cases that turn upon an analysis of the particular facts for that function has been delegated to the courts of appeals. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918). Where, as here, a court of appeals holds that the Board's findings are supported by substantial evidence, its decision should not be disturbed.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

.....

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January, 1970

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374-310

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 973

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–32) is reported at 415 F. 2d 440. The Board's decision and order (Pet. App. 44–111) and supplemental decision and order (Pet. App. 34–43) are reported at 148 NLRB 1080 and 167 NLRB No. 8, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1969. The petition for a writ of certiorari was filed on December 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the National Labor Relations Board that the employer locked out its employees for the sole purpose of forcing their bargaining representative to accept its legitimate bargaining proposals—thus making the lockout a lawful one—is supported by substantial evidence.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 2–3 of the petition.

STATEMENT

On January 22, 1963, Hess Oil and Chemical Corporation (the "Company") purchased the Corpus Christi, Texas, oil refinery involved in this case from the Delhi-Taylor Oil Refining Company (Pet. App. 36, 54; R. 98–99, 127).[1] Petitioner (the "Union") had represented a bargaining unit of production and maintenance employees at the refinery for over 21 years (Pet. App. 36–37, 55–57; R. 98, 100, 102, 137, 221, 247). The Board found, and the Company stipulated, that the unit, which had always included both laboratory and warehouse employees, was an appropriate one for collective bargaining purposes, and that the Union has at all material times represented a majority of the unit employees (Pet. App. 36–37, 56; R. 221–222, 234–235).[2]

[1] "R." refers to the joint appendix in the court below, a copy of which has been filed with the Clerk of this Court.

[2] The Union had been recognized by Delhi-Taylor without Board certification (Pet. App. 55, n. 13; R. 224).

Between March 8 and April 1, 1963, representatives of the Company and the Union met eight times in an effort to negotiate a collective bargaining agreement. Early in the course of these negotiations the Company's Senior Vice-President, H. W. McCollum, notified Union representatives W. J. Forrester and J. Elro Brown that the Company would assume operative control of the refinery on April 1, 1963 (Pet. App. 36, 57, 58; R. 102, 248); that it would not assume the existing collective bargaining agreement between the Union and Delhi-Taylor, which then had a year to run, but did want to negotiate a new agreement (Pet. App. 36, 58–59; R. 138, 248); and that any new agreement would have to contain certain changed provisions, which he then set forth (Pet. App. 36, 57–58; R. 102–104, 138–139, 259). Among these provisions was one which excluded laboratory and warehouse employees from the bargaining unit (Pet. App. 36, 58; 138, 185–186). McCollum explained that the Company wanted to exclude laboratory employees because they were not covered by collective bargaining agreements at any of the Company's other locations, to which they would probably be transferred from time to time, rather than remaining exclusively at Corpus Christi (Pet. App. 90, n. 58; R. 112–113, 287–291). As to the warehouse employees, McCollum stated that the Company planned to retain only one, who would be given substantially more responsibility for record-keeping (Pet. App. 90, n. 58; R. 113–114, 291–294).[3] The Union advised McCollum that it

[3] There were 26 laboratory and six warehouse employees in the unit of approximately 200 (Pet. App. 56–57; R. 191–192, 220, 237).

"would have to represent laboratory and warehouse employees because [it] felt that [it] had an obligation to them" (Pet. App. 37; R. 158).

In the course of the ensuing negotiations the Company and the Union reiterated their respective positions with regard to the exclusion of these employees from the unit. However, as more fully set forth in the trial examiner's decision (Pet. App. 57–74), the negotiations were devoted almost wholly to economic and other major matters at issue between the parties. The Union took the position that the Company should adopt the existing contract with Delhi-Taylor in its entirety for a period of one year (Pet. App. 64; R. 158–161, 261). The Company insisted however, that in order to turn the refinery, which had been losing money, into a profitable operation the Union would have to agree to: (1) a two-year contract, not to become effective until June 1, 1963, so as to provide the Company with a probationary period of two months within which it could terminate employees without any right on the part of the Union to file grievances; (2) a seniority provision under which employees retained after this period would be given numerical placement in accordance with their standing on the existing list; (3) a reduction in the number of existing employee job classifications and lines of promotion; and (4) elimination of the present provision restricting the subcontracting of work (Pet. App. 57–58; R. 102–105, 137–139, 248–251, 253–256, 267–268, 269–271). McCollum indicated that if the Union did not communicate its acceptance of these terms to him

by March 25, the Company would not continue operation of the refinery after April 1, 1963 (Pet. App. 58, n. 20, 60–61, 66; R. 105–106, 138, 139, 143–144, 169, 171).

On the evening of March 25, 1963, the Union voted on the Company's written proposal of that date, which incorporated all of McCollum's earlier demands, including clauses excluding the laboratory and warehouse employees from the bargaining unit. After the voting, McCollum was notified by telegram that "the employees * * * [had] voted overwhelmingly not to accept the proposal" (Pet. App. 67–68; R. 169–172, 261, 279, 331). Shortly thereafter, McCollum telephoned Brown, who informed him that one of the problems standing in the way of agreement was Delhi-Taylor's failure to come to terms with the Union over certain termination and accrued vacation pay to which the Union felt the employees were entitled. Brown stated that, if McCollum could persuade Delhi-Taylor to pay the employees what they thought they deserved, he felt there would be no problem in reaching agreement on a contract, but that these matters had to be straightened out first (Pet. App. 68–69 and n. 29; R. 172–173, 279–280). McCollum stated that he was "anxious not to shut the refinery down" and would speak to Delhi-Taylor President Sewell (Pet. App. 69; R. 280).

By March 28, McCollum had succeeded in settling the dispute between Delhi-Taylor and the Union (Pet. App. 69–71; R. 173–175, 281–282). Nevertheless, the Union again rejected the Company's proposed con-

tract, and on April 1 the Company shut down the refinery (Pet. App. 38–39, 72–73; R. 199, 215, 306). It remained closed until May 7, 1963, at which time the Company recalled all but nine of the employees (Pet. App. 78–79; R. 215–217, 224, 244–245).[4] An unfair labor practice proceeding against the Company ensued.

On the facts presented to it, the Board concluded in its original decision and order of September 16, 1964 (Pet. App. 44–111), that the respondent Company had violated Sections 8(a)(5) and (1) of the Act by unlawfully insisting that the laboratory and warehouse employees be excluded from the existing bargaining unit, and Sections 8(a)(1), (3) and (5) of the Act by locking out its employees as a means of compelling Union acceptance of its contract proposals (Pet. App. 44–45, 90, 98–99). On September 23, 1964, the Company filed a petition for review of the Board's order in the court of appeals below. On June 2, 1965, however, the court of appeals granted the Board's motion for a stay of further proceedings pending its reconsideration of the case in light of this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300. (Pet. App. 17, 35).

[4] Although the parties met on five or six occasions after the refinery closed, there was little change of position, and at the final meeting on May 22, after the employees had already been recalled to work, there was still fundamental disagreement on the Company's proposals (Pet. App. 73–82; R. 201–202, 205–215, 231–232, 294–304).

On August 17, 1967, the Board issued a supplemental decision and order (Pet. App. 34–43). It reaffirmed its initial finding and order based thereon, that the Company's insistence upon the exclusion of the laboratory and warehouse employees from the unit was unlawful;[5] it set aside, however, its previous finding that the Company had engaged in an unlawful lockout. More specifically, the Board found (Pet. App. 38, 40–41) that, although the Company's insistence upon the exclusion of the two classes of employees from the unit was violative of the Act, both the Company and the Union had been content to defer resolution of this issue until settlement of the substantive terms of the contract; that the Company had not conditioned execution of such a contract upon the Union's agreement to exclude the laboratory and warehouse employees; and that the Company's position with respect to such exclusion had not materially motivated its decision to lock out its employees. In the light of these subsidiary findings, the Board further concluded that the lockout was not in furtherance of the Company's unlawful insistence upon the exclusion of the two classes of employees from the unit, but rather in support of its legitimate bargaining proposals on which the parties had reached an impasse, and that therefore, under *American Ship Building Co.*, it had not violated the Act. Accordingly, the Board dismissed the

[5] The Board found that, although it was not unlawful for the Company to propose alteration of the unit, it could not lawfully insist upon this over the Union's objection since such a change is not a mandatory subject of collective bargaining (Pet. App. 37, n. 4). The validity of this finding is not in issue here.

allegations of the complaint pertaining to the lockout (Pet. App. 41).

The court of appeals sustained the Board's findings, enforced its order, and dismissed both the Company's petition to review the Board's 8(a)(5) findings and the Union's petition to review that portion of the Board's supplemental decision and order relative to the validity of the lockout (Pet. App. 15–32).

ARGUMENT

The question which petitioner seeks to raise—whether an employer violates the Act by locking out his employees in order to force their bargaining representative to accept a non-mandatory bargaining proposal—is not presented on the record in this case. On the basis of the facts summarized in the Statement (*supra*, pp. 3–6), and more fully set forth in the trial examiner's decision (Pet. App. 57–74), the Board found, and the court of appeals agreed (Pet. App. 40–41, 31–32), that the Company's insistence on the exclusion of the two classes of employees from the unit did not contribute to the impasse between the parties, or to their failure to reach agreement, and thus did not prompt the lockout. Accordingly, both the Board and the court of appeals concluded that the lockout was in support of the Company's legitimate bargaining proposals, and therefore lawful under this Court's decision in *American Ship Building*

Co., supra, 380 U.S. at 306, 318. Petitioner's contention that the lockout was in support of both the mandatory and non-mandatory bargaining proposals and therefore illegal rests upon its differing reading of the record and simply raises an evidentiary issue which is not appropriate for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

Moreover, the record, as the court of appeals concluded, adequately supports the Board's finding that the Company's insistence upon the inclusion of the two classes of employees from the unit was not a significant factor in the Company's decision to lock out the employees. It is clear from the record as a whole that, although the parties disagreed over the Company's proposal to exclude these employees from the coverage of any collective bargaining agreement, this problem receded into the background as the negotiations focused upon the major matters at issue between the parties. In the circumstances, the Board could reasonably find, as it did, that the lockout was in support of the Company's legitimate mandatory bargaining proposals and therefore lawful. Thus, the decision below is in accord with *American Ship Building Co.* and not in conflict with the decisions of other courts of appeals cited by petitioner (Pet. 10–13).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1969

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INTERNATIONAL UNION, AFL-CIO

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In their briefs in opposition to the petition, respondents both contend that the Board in this case found as a fact that the Company locked out its employees *solely* in support of its legitimate bargaining demands. Therefore, they argue, this case does not present the question of whether a lockout in support of *both* mandatory and nonmandatory demands is an unfair labor practice. This argument, we submit, is based on a distorted reading of the Board's decision.

The Board found that the Company had *insisted* on its nonmandatory demand that the laboratory and warehouse employees be excluded from the bargaining unit. There is absolutely no ambiguity in this aspect of the Board's de-

cision. Indeed, it was on the basis of this finding that the Board held that the Company had committed an unfair labor practice. As stated in the Board's brief to this Court, the Board "reaffirmed its initial finding, and order based thereon, that the Company's insistence upon the exclusion of the laboratory and warehouse employees from the unit was unlawful." (NLRB Br., p. 7.)

Since the Company continued to insist upon this unlawful demand throughout the negotiations, there can be no question that one purpose of the lockout was to force acceptance of this demand. Indeed, the Board expressly so found. In its supplemental decision, the Board adopted the trial examiner's finding that the lockout was "designed to bring economic pressure on the Union to compel it to sign a contract *on its terms*." (App. 38-39; emphasis added.) One of those terms, of course, was the exclusion of laboratory and warehouse employees from the bargaining unit.

There is thus no substance whatever to the contention that the Board found the lockout to be *solely* in support of the Company's legitimate demands. On the contrary, the Board expressly found that the purpose of the lockout was to force acceptance of *all* of the Company's proposals.

The Board did say that the parties were at an impasse on the legitimate issues as well, and that the Company's nonmandatory demand "did not contribute to the impasse between the parties on such issues." The Board also observed that these issues were "items which both parties deemed to be of fundamental importance." "In view of these circumstances," the Board concluded, "Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations, and we find that Respondent's position on that issue did not materially motivate its decision to lock out its employees." (App. 40-41.) On this basis, the Board held that the lockout itself was not an unfair labor practice.

But the finding that the Company would have locked out in any event, and that the nonmandatory demand did not *materially* motivate the lockout, is not the equivalent of a finding that the lockout was *solely* in support of legitimate demands. Rather, what the Board was saying was that the lockout was not solely or primarily designed to force acceptance of the nonmandatory demand—even though that was one of its objectives.

Thus, this case raises precisely the question stated in the petition—whether a lockout in support of both mandatory and nonmandatory demands is an unfair labor practice, regardless of whether the Company would have locked out in any event to force acceptance of its legitimate proposals. As we have already demonstrated in the petition, this is an important question of law, and one on which there now appears to be a conflict among the circuits.

It is noteworthy that neither the Company nor the Board denies the importance of this question or the existence of this conflict. Their sole argument, rather, is that the question is not raised on this record. However, as we have demonstrated above, the question is squarely presented on the facts *as found by the Board*.

CONCLUSION

For the reasons stated herein and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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